E

WIPO

WIPO/GRTKF/IC/4/3
ORIGINAL: English
DATE: October 20, 2002

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Fourth Session
Geneva, December 9 to 17, 2002

PRELIMINARY SYSTEMATIC ANALYSIS OF NATIONAL EXPERIENCES WITH THE LEGAL PROTECTION OF EXPRESSIONS OF FOLKLORE

Document prepared by the Secretariat

OVERVIEW

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee"), at its third session, requested the preparation of "an analytical and systematic document on national experiences of protection of folklore either by means of traditional IP or by means of *sui generis* legislation, and the implementation of such legislative frameworks, including the role of customary law and forms of interaction with legal systems in other countries, as a basis for further discussions."[1]

2. This document accordingly provides, on the basis of actual examples and national experiences, a technical analysis of the use of existing intellectual property (IP) and *sui generis* approaches for the legal protection of traditional cultural expressions (used synonymously with 'expressions of folklore'). Comments are invited on the document before March 31, 2003. A further version of the document will be published for the fifth session of the Committee in 2003.

3. The document does not propose new tasks, but builds on the WIPO Report on National Experiences (WIPO/GRTKF/IC/3/10) which proposed certain tasks and was considered at the third session of the Committee. The document will be complemented by oral presentations to be made during the fourth session of the Committee. These presentations will be made by several States and an intergovernmental organization on *sui generis* laws, systems or mechanisms they have established or are considering.

4. This document has been requested as input into the continuing policy dialogue in the Committee on the legal protection of folklore. In addition, the information in this document, comments on it and the oral presentations will inform WIPO's ongoing technical cooperation program on the legal protection of folklore, and will contribute to the forthcoming "WIPO Practical Guide on the Legal Protection of Traditional Cultural Expressions." The present version of the document focuses mainly on copyright and related rights. Other relevant IP branches are dealt with more briefly, and will be developed in future versions.

5. Certain tentative conclusions are set out in Part IV (and summarised in Part VI) to facilitate further discussion of the issues and possible practical approaches to the protection of expressions of folklore and traditional cultures, rather than to pre-empt future policy debate.

I. INTRODUCTION

6. The "Final Report on National Experiences with the Legal Protection of Expressions of Folklore"[2] ("the Report on National Experiences") considered at the third session of the Committee, presented analysis of and conclusions on the national experiences of those States that had responded to the questionnaire on national experiences with the legal protection of expressions of folklore[3] circulated at the request of the Committee at its first session.

---

1 See document WIPO/GRTKF/IC/3/17, paragraph 249.
2 WIPO/GRTKF/IC/3/10.
3 WIPO/GRTKF/IC/2/7.

7. At the third session, Committee participants requested further analysis and information on how existing intellectual property rights (IPRs) have been or could be used by Indigenous peoples and traditional communities to protect traditional cultural expressions,[4] and on the experiences of those Members who have implemented or are contemplating specific *sui generis* statutory systems of protection. More precisely, the Committee decided that "on the basis of [the Report on National Experiences], the Secretariat should prepare an analytical and systematic document on national experiences of protection of folklore either by means of traditional IP or by means of *sui generis* legislation, and the implementation of such legislative frameworks, including the role of customary law and forms of interaction with legal systems in other countries, as a basis for further discussions at the fourth session of the Intergovernmental Committee."[5]

8. Certain States already provide specific legal protection for expressions of folklore, through one or more of several options (such as provisions based upon the *sui generis* Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 or entirely new *sui generis* statutory systems); others do not, either because they do not believe it is appropriate or necessary to do so (for example, because they believe existing IPRs are adequate), or because they are still considering which approaches and systems are the most desirable.[6]

9. In broad summary, at this stage of the discussion there are two general approaches apparent in the Committee's consideration of this question. Some Members believe that expressions of folklore are adequately protected by existing IP rights, perhaps supplemented by specific measures to address particular needs, and that no additional distinct system of protection is necessary or appropriate. Others believe that the establishment of specific statutory systems is necessary either to complement existing IPRs or act as a substitute for them because they are regarded as inadequate and/or inappropriate.

10. These two lines of enquiry should be undertaken in parallel, without privileging one over the other, as several States at the third session noted. As they also pointed out, the two main approaches are not necessarily mutually exclusive. A dual-track approach could be formulated as follows: it is understood that traditional cultural expressions have already some of their main aspects covered by existing IPRs and mechanisms, but other measures may be necessary to complement the existing legal system and to deal with perceived gaps in protection. Eventually, the protection afforded to traditional cultural expressions could be found in a multi-faceted menu of options, using both IPRs and some *sui generis* options.[7] In some cases, extended or modified usage of the IPR system has acted as a bridge between these two approaches. In line with this perspective, this document addresses both existing rights and *sui generis* approaches.

---

4 The terms "expressions of folklore" and "traditional cultural expressions" are used interchangeably in this document.

5 WIPO/GRTKF/IC/3/17, paragraph 294.

6 WIPO/GRTKF/IC/3/10.

7 WIPO/GRTKF/IC/3/17, paras 179, 181, 189, 192, 194, 197 and 198.

The Structure and Focus of this Document

11. In line with the request of the Committee at its third session, this document discusses and analyses in a systematic and technical manner the use of existing IPRs for the legal protection of traditional cultural expressions, and the ways in which *sui generis* systems adopted by certain States and regional organizations have sought to complement or substitute for IPRs. Information on the role of customary law and forms of interaction with legal systems in other countries is also included, where possible. In doing so:

(i) concrete examples of traditional cultural expressions for which legal protection is desired or has been claimed are used; and,

(ii) the usefulness of existing rights and of adopted *sui generis* systems is evaluated as against the stated objectives and concerns of Indigenous peoples and traditional communities.

12. The remainder of this document is structured as follows:

Part II - Practical Examples of Traditional Cultural Expressions for which Legal Protection is Desired;

Part III - Objectives of Indigenous Peoples and Traditional Communities;

Part IV – Systematic Analysis of Use of Existing Intellectual Property Rights and *Sui Generis* Approaches:

(i) literary and artistic productions - copyright;

(ii) performances of traditional cultural expressions – performers' rights;

(iii) collection, recordal and dissemination of traditional cultural expressions – copyright and related rights;

(iv) distinctive signs – trademarks and geographical indications;

(v) designs - industrials designs;

(vi) unfair competition (including passing off);

Part V – Acquisition, Management and Enforcement of Rights;

Part VI – Conclusions.

13. As this document is based as far as possible on national experiences and empirical information, the present version focuses most closely on copyright and related rights as most reported practical experience in protecting traditional cultural expressions has been in this area. Even so, it is well established that other branches of the IP system are also relevant to cultural expressions, although there may be less empirical information on them at this stage. Traditional distinctive signs and designs are therefore covered in brief, and unfair competition is also briefly discussed.

14. Patents of invention are also relevant to the protection of traditional cultural expressions – for example, a patent obtained in respect of a process for formation of the Caribbean steelpan musical instrument has raised objections from persons in the Caribbean.[8] However, patent law is not discussed in this document, although it could be in future versions. Similarly, other relevant areas could be unjust enrichment, but as there is no empirical information at this stage, it is not taken further in this version.

15. The potential overlaps between these various IP branches are also noted. For example, traditional designs may be protected by copyright and/or industrial design law. An artistic work may be protected by copyright and may also be recognised and used as a trademark under certain conditions.

Comments Invited

16. This document does not purport to provide a definitive analysis. It is rather a further stage in the discussion. It is therefore a preliminary document, intended to invite comments and further input. A further version will be prepared for consideration by the Committee at its fifth session in 2003. Comments on this document may be sent to the WIPO Secretariat c/o the Traditional Knowledge Division, preferably by e-mail to grtkf@wipo.int, or otherwise at WIPO, 34, chemin des Colombettes, 1211, Geneva 20 (Switzerland), Fax +41 22 338 8120. Comments received before March 31, 2003 will be taken into account for purposes of the further version of this document.

Relationship with the Report on National Experiences (WIPO/GRTKF/IC/3/10)

17. This document complements and should be read together with the Report on National Experiences. It does not propose any further tasks or activities.

18. In the Report on National Experiences, four tasks were proposed for consideration by the Committee. Two were not approved: the development of model provisions for national laws using the Model Provisions, 1982 as a starting point (referred to as Task 2); and the examination of elements of possible measures, mechanisms or frameworks for the functional extra-territorial protection of expressions of folklore (referred to as Task 3).

19. The other two tasks were approved. The first was for enhanced legal-technical cooperation, to be provided by the WIPO Secretariat upon request, for the establishment, strengthening and effective implementation of existing systems and measures for the legal protection of expressions of folklore (referred to as Task 1). The second was for the commissioning of a practical study on the relationship between customary laws and protocols and the formal IP system insofar as they relate to the legal protection of expressions of folklore (referred to as Task 4).

20. The Secretariat will as soon as possible publish a practical manual containing case-studies, guidelines and "best practices" for national lawmakers, peoples and

---

[8] See "A Nation's Steel Soul," New York Times, July 7, 2002, at http://www.nytimes.com/2002/07/07/weekinreview/07BARA.html

communities, on the legal protection of traditional cultural expressions at the national level.[9] The provisional title of this manual is "WIPO Practical Guide on the Legal Protection of Traditional Cultural Expressions." The information contained in the present document and comments on it, as well as the information and lessons learned from the oral presentations to be made at the fourth session of the Intergovernmental Committee (see below), will be useful inputs for carrying out Task 1 as a whole, including drafting the Practical Manual.

Oral Presentations

21. This document discusses certain *sui generis* systems in relation to existing IP rights. It is based on a reading of the relevant laws, on reports of national experience, and a range of practical case studies. Participants in the work of the Committee have stressed the need for practical information on actual experiences with the conceptualization, development, establishment and implementation of these systems. Therefore, in order to complement this document, and meet the Members' requests, the WIPO Secretariat will organize, as an informal part of the fourth session of the Intergovernmental Committee, a number of oral presentations on national experiences with specific legislative systems for the legal protection of folklore. This will offer an opportunity for direct description, in greater depth and from a practical viewpoint, of the laws, systems or mechanisms (actual or proposed as the case may be), including actual experiences with developing, enacting and implementing them. Further information on the presentations will be made available at the session.

22. While the close links between expressions of traditional culture and "technical" traditional knowledge (such as medicinal knowledge) is recognized, at present the Committee is examining these two subjects separately, but in parallel. This is because the folklore question has a long history of discussion in WIPO and elsewhere, involves a distinct constituency of rightsholders, users and other stakeholders, and raises specific questions for IP not all of which are also relevant to technical traditional knowledge. In particular, this is an area where national authorities have had longer experience in developing and applying specific *sui generis* approaches to legal protection, in contrast to traditional knowledge which, in itself, has in most cases been addressed only relatively recently as a specific object of legal protection. As in this paper, the oral presentations will focus especially on folklore protection, even if these systems may also be relevant to other forms of traditional knowledge.

II. PRACTICAL EXAMPLES OF TRADITIONAL CULTURAL EXPRESSIONS FOR WHICH LEGAL PROTECTION IS DESIRED

The Meaning, Scope and Nature of "Traditional Cultural Expressions"

23. The meaning and scope of the term "traditional cultural expressions" and other terms referring to more or less the same subject matter such as "expressions of folklore," "indigenous culture and intellectual property" and "intangible and tangible cultural heritage' (which is perhaps the most comprehensive term, and broadest in scope) continue to be discussed in various intergovernmental, regional and national and non-governmental fora. They cover potentially an enormous variety of customs, traditions, forms of artistic

[9] See further WIPO/GRTKF/IC/3/10, para. 155.

expression, knowledge, beliefs, products, processes of production and spaces that originate in many communities throughout the world. The growth of interest in the legal protection of traditional knowledge as such has also raised questions about the specific nature of legal protection of expressions of folklore and traditional cultures within the broader concept of traditional knowledge. A detailed discussion on questions of terminology is provided in document WIPO/GRTKF/IC/3/9.

24. The context in which cultural heritage is generated and preserved is important to its meaning, and the terminology varies depending on the region and the cultural community from which the term and its definition emanates. It also depends on the purpose for which the term and definition is developed. Therefore, what is and what is not considered part of "cultural heritage" or the more specific "traditional cultural expressions" is a complex and subjective question, and for these reasons there are no widely-accepted definitions of these terms.[10]

25. The need for clarity on the meaning and scope of the term "intangible cultural heritage," for example, remains a key to further progress by the United Nations Educational, Cultural and Social Organization (UNESCO) on its Preliminary Draft Convention for the Safeguarding of Intangible Cultural Heritage (in view of the relationship between this draft convention and IP rights, WIPO is following and contributing to this UNESCO process in the spirit of mutual cooperation as requested by Member States).

26. It is not intended to summarize or analyze this discussion further in this document. However, it is useful to make a few remarks on the nature of traditional cultural expressions relevant to questions of IP protection.

27. First, "expressions of" traditional culture (or "expressions of" folklore) may be either intangible, tangible or a combination of the two. On the other hand, the underlying traditional culture or folkloric knowledge from which the expression is derived is generally intangible. For example, a painting may depict an old myth or legend – the myth and legend are part of the underlying intangible "folklore," as are the knowledge and skill used to produce the painting, while the painting itself is a tangible expression of that folklore.[11]

28. Second, traditional cultural expressions for IP purposes include both tangible and intangible components. A separation between the two is artificial, as it may be said that tangible expressions are the "body" and intangible expressions the "soul" which together form a whole. That said, tangible and intangible expressions of culture may require different measures for their legal protection.

---

[10] See Palethorpe and Verhulst, "Report on the International Protection of Expressions of Folklore Under Intellectual Property Law" (Study Commissioned by the European Commission), October 2000, pp. 6 to 13.

[11] *Idem.*

29. The description of expressions of folklore provided in the Model Provisions, 1982 makes the distinction between intangible and tangible expressions of folklore. It reads as follows:

> [. . .] "*expressions of folklore*" means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a 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 actions, 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, jewelry, basket weaving, needlework, textiles, carpets, costumes;
> (b) musical instruments;
> (c) [architectural forms]."

This is a useful description of "traditional cultural expresions" or "expressions of folklore" for present purposes.

30. Third, cultural heritage is in a permanent process of production; it is cumulative and innovative. Culture is organic in nature and in order for it to survive, growth and development are necessary – tradition thus builds the future. While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework.[12] As the Japanese industrial designer Sori Yanagi recently stated, incorporating the element of traditional folk craft into modern design can be more valuable than imitating folk craft itself: "Tradition creates value only when it progresses. It should go forward together with society."[13] So, as traditional artists continually bring fresh perspectives and experiences to their work, tradition can be an important source of creativity and innovation.

31. Hence there may be a distinction between "traditional" cultural heritage and modern, evolving cultural heritage (this point has also been raised in discussions in UNESCO for the safeguarding of the intangible cultural heritage). Put another way, one could draw a distinction between (i) pre-existing, underlying traditional culture (which may be referred to as traditional culture or folklore*strictu sensu*) and (ii) literary and artistic productions created

---

[12] See Bergey, Barry "A Multi-faceted Approach to the Support and Conservation of Folk and Traditional Culture," paper delivered at International Symposium on Protection and Legislation of Folk/Traditional Culture, Beijing, December 18 to 20, 2001.

[13] *Japan Times*, June 30, 2002.

by current generations of society and based upon or derived from pre-existing traditional culture or folklore.

32. Pre-existing folklore is generally characterized by being traditional, related to culture, intangible, trans-generational (i.e. old) and shared by one or more groups or communities. It is likely to be of anonymous origin, inasmuch as the notion of authorship is relevant at all. On the other hand, a contemporary literary and artistic production made by current generations of society and derived from folklore may be a "new" work in respect of which there is a living and identifiable creator (or creators). These productions may be tangible or intangible.

33. This distinction is also reflected in some national laws, such as of Tunisia (which refers to both "folklore" and "works inspired by folklore")[14]. In addition, the Tunis Model Law on Copyright protects, as original copyright works, derivative works which include "works derived from national folklore," whereas folklore itself, described as "works of national folklore," is accorded a special (*sui generis*) type of copyright protection.

34. While perhaps not too much should be made of this distinction because of the "living" and cumulative nature of cultural heritage, such a distinction is relevant to an IP analysis. This is because, as will be discussed later on, new interpretations of pre-existing folklore are more susceptible of protection by current IP laws. On the contrary, pre-existing folklore is not as well protected by current laws – and, it is a threshold policy question whether or not the pre-existing folklore ought to receive legal protection. If that question were to be answered in the affirmative, it is in this area that some modifications to existing rights, specific measures to complement existing rights and/or *sui generis* mechanisms or systems may be necessary.

35. Just as tradition can be a source of innovation by members of the relevant cultural community or outsiders, one can also identify other uses of tradition relevant to an IP analysis. Aside from tradition-based innovation, tradition can be "imitated" by outsiders, or "recreated" by members of the cultural community. Tradition can also be "revitalized" (in cases where the tradition has disappeared) or "revived" (in cases where it has fallen into disuse). While tradition-based innovation is more likely the subject of IP protection, imitations, recreations, revitalization and revivals of traditional cultural expressions may not be.

Actual and Specific Examples

36. Based on the fact-finding missions undertaken by WIPO in 1998 and 1999, the responses to the folklore questionnaire and other materials, set out here are concrete and specific examples of traditional cultural expressions for which legal protection has been sought or is desired.[15]

---

[14] Law 94-36 of February 24, 1994 on Literary and Artistic Property.

[15] The removal of sacred and ceremonial objects (movable cultural properties) is not included here. These issues are perhaps less relevant to IP and more to laws directly concerning cultural heritage, as well as the fields of archaeology and anthropology.

(i) Paintings made by Indigenous persons have been reproduced by non-Indigenous persons on carpets, printed clothing fabric, T-shirts, dresses and other garments, and greeting cards, and subsequently distributed and offered for sale by them (the non-Indigenous persons). Examples of such instances are offered by the cases referred to by Australia in its response to the folklore questionnaire, the facts of which are summarized in the Final Report (WIPO/GRTKF/IC/3/10).[16] Certain of these cases are also discussed in the study commissioned and published by WIPO "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions."[17] Body paintings have also been photographed, and rock paintings (petroglyphs) have been reproduced (*inter alia* in photographs) by non-Indigenous persons and subsequently distributed and offered for sale. The "Minding Culture" study also contains and discusses such examples.

(ii) Traditional songs and music have been recorded, adapted and arranged, publicly performed and communicated to the public, including over the Internet. In the present digital age, musicians need not go any further than their computer and home studio to encounter and engage music from all over the world. Traditional music can be downloaded from any number of free music archives onto one's home computer and stored as digital information that can then be transferred into other sound files (that is, new compositions) where it can be manipulated in whatever manner one creatively sees fit.[18] A major concern in this regard is that music originally recorded for ethnographic purposes is now being sampled and used in new compositions for which copyright protection is claimed (see also below under "Collection, Recordal and Dissemination of Traditional Cultural Expressions – Copyright and Related Rights"). Much of this music was recorded from live performances of Indigenous and traditional music, often without the knowledge of the performers. Perhaps the most publicized example of this is the successful "Deep Forest" CD produced in 1992, which fused digital samples of music from the Ghana, the Solomon Islands and African 'pygmy' communities with 'techno-house' dance rhythms.[19] A second album, "Boehme" was produced in 1995, similarly fusing music from Eastern Europe, Mongolia, East Asia and Native Americans. Rights to the well-known "The Lion Sleeps Tonight" – based upon the 1930s composition "Mbube" by the late South African composer Solomon Linda - continue to be disputed in a complex matter.[20] Another example reported on is the European group Enigma's "Return to Innocence" hit of 1993.[21] A related issue is the composition by non-Indigenous persons of songs and music that are pseudo-Indigenous because they, for example,

---

16 See WIPO/GRTKF/IC/3/10, para. 126.

17 "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions," by Ms. Terri Janke. Available at http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html

18 See Sandler, Felicia, "Music of the Village in the Global Marketplace – Self-Expression, Inspiration, Appropriation, or Exploitation?," Ph.D. Dissertation, University of Michigan, 2001, pages 58 and 59.

19 *Idem*, pages 58 to 63; Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation" 1996 Yearbook for Traditional Music, 28 (1996), 57 to 85.

20 Discussion with Dr. Owen Dean, Spoor and Fisher Attorneys, Pretoria, South Africa, October 23, 2002. See also Malan, Rian "Where does the Lion Sleep Tonight", at http://www.3rdearmusic.com/forum/mbube2.html (October 23, 2002).

21 See "Taiwanese singer found a global audience," Financial Times, April 2, 2002. Available at http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT3DDC52KZC&liv (August 12, 2002).

treat Indigenous subject matter, and/or are accompanied by a rhythmic pattern which is associated with Indigenous music.[22]

(iii) Oral Indigenous and traditional stories and poetry have been written down, translated and published by non-Indigenous or non-traditional persons, raising issues about the rights and interests of the communities providing this material as against copyright owned and exercised by those recording, translating and publishing it.

(iv) Traditional musical instruments have been transformed into modern instruments, renamed and commercialized, or used by non-traditional persons active in the world music community or the New Age movement, or for purposes of tourism (such as the steelpan of the Caribbean region and the didgeridoo of Indigenous Australians).[23] Musical instruments, such as drums and the didgeridoo, are also subject to unauthentic mass-production as souvenir items. Janke gives examples of didgeridoos and other objects made outside of Australia, and then imported into Australia and passed off as if locally made.[24]

(v) Indigenous peoples and traditional communities have expressed the need to be able to protect designs embodied in hand-woven or hand-made textiles, weavings and garments have been copied and commercialized by non-Indigenous persons. Examples would include: the *amauti* in Canada, *saris* in South Asia, the "tie and dye" cloth in Nigeria and Mali, kente cloth in Ghana and certain other countries in West Africa, traditional caps in Tunisia, the Mayan *huipil* in Guatemala; the Kuna *mola* in Panama and the wari woven tapestries and textile bands from Peru; carpets (of Egypt, Oman, the Islamic Republic of Iran and other countries); tents (such as the traditional tipi designs in North America); shoes (such as traditional moccasin designs in North America). In its response to the folklore questionnaire, Bhutan, for example, reported on the copying and use of their traditional textile designs and patterns on machine-made fabrics which diluted the intrinsic value of their textile designs and at the same time stifling the local weaving practice which is mostly prevalent among the women folk in their villages.[25] The imitation of traditional textile designs causes not only economic prejudice but also threatens to destroy traditional textiles and weaving crafts. Such reproductions occurs when outsiders visit traditional communities to "learn" techniques of traditional weaving and subsequently leave with the knowledge and without prior informed consent.

(vi) The recording or adaptation and public performance of Indigenous stories, plays, and dances (such as *sierra* dance of Peru and the *haka* dance of Maori people of New Zealand) has raised questions about protection of the rights of the Indigenous communities in these expressions of their culture.

(vii) The photographing of live performances of songs and dances by Indigenous persons, and the subsequent reproduction and publication of the photographs on CDs, tape cassettes, postcards and on the Internet (such as the performances of the Wik Apalech Dancers of Australia, another one of the cases discussed in the "Minding Culture" study) has raised similar concerns.

---

22 Sandler, *op. cit*., pages 39 and 40.
23 Sandler, Felicia, *op. cit*., pages 35 to 38.
24 Janke, *op. cit*, pages 37 to 40.
25 See response of Bhutan to the folklore questionnaire.

(viii) To service the souvenir market, arts and crafts (such as woven baskets, small paintings and carved figures) employing generic traditional art styles have been reproduced, imitated, and mass-produced on such non-traditional items as t-shirts, tea-towels, place mats, playing cards, postcards, drink coasters and coolers, calendars and computer mouse pads. There are many examples of craft items that have been commercialized by other parties in this way, such as the *chiva* from Colombia.

(ix) The collection, recordal and dissemination of and research on Indigenous peoples' cultures raises multiple concerns for Indigenous and traditional peoples. First, there is the possibility of breaches of confidentiality between ethnographers and informants. Second, the possibility of the misrepresentation of Indigenous and traditional cultures. Then, there can be the lack of access to documentary materials by the people about whom the research was conducted. And, finally, there is concern that much documentation of Indigenous and traditional cultures is made, owned and commercialized by non-Indigenous and non-traditional persons.[26]

(x) In order to pass off an item (such as art or a craft item) as "indigenous," the style or method of manufacture of Indigenous and traditional productions has been used by non-Indigenous or non-traditional enterprises. Examples would include carvings, weavings and other visual art forms incorporating Indigenous or traditional motifs or designs, or music and dance forms incorporating Indigenous or traditional melodic material, rhythmic patterns, tempos, meters and so forth.[27] As the Group of Countries of Latin America and the Caribbean (GRULAC) stated in its submission to the first session of the Intergovernmental Committee, the method of manufacture and "style" of traditional products are vulnerable to imitation:

> ". . . various representative sectors of communities and groups that produce traditional manifestations of textile art and handicraft (pottery, sculptures, etc) have reported that their works and industrial designs are being subjected to more subtle copying than the imitation or plagiarizing of the style of the original art would be, but nonetheless equally prejudicial to their economies. Some works and designs of textile goods are produced using traditional methods of considerable antiquity. There have been situations in which persons alien to the place of origin of the art or the design have come to that place in order to learn traditional methods, but then reproduced them abroad, using handicraft or even industrial methods. In such cases, original designs are stylized in such a way that, although it is not possible to allege that any design or specific work has been copied, the style aspect of the product directly evokes the original products of the community or region that originally created them."[28]

---

[26] Janke, Terri, Our Culture, Our Future (Report prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1999), pages 30 to 32; Sandler, *op. cit*., pages 53 to 56.

[27] Sandler, *op. cit*., pages 46 to 48.

[28] WIPO/GRTKF/IC/1/5, Annex II, pp. 7 and 8.

(xi) Sacred/secret material has been subject to unauthorised use, disclosure and reproduction, such as the sacred Coroma textiles of Bolivia[29], as well as sacred songs which can only be performed in a particular place and for a specified purpose.[30]

(xii) Cultural concerns and legal questions have been raised by the commercial use of originally Indigenous words by non-indigenous entities, such as 'tohunga', 'mata nui', 'pontiac', 'cherokee', 'billabong', 'tomahawk', 'boomerang', and 'tairona.' The recent 'tohunga' case concerned Lego, a Danish toy company, and the Maori people of New Zealand. Within a new range of toys, several were given Maori and Polynesian names, in particular "*tohunga*," the name of a traditional spiritual healer. Since the issue did not concern the registration of trademarks, there was no direct application of trademark law, even though Maori considered this particular use of their language to be inappropriate and offensive. Following approaches from Maori groups claiming expropriation of cultural heritage rights, it was reported that Lego, while noting that it hadn't done anything illegal, had acknowledged the need to take account of such cultural concerns in its future activities.[31] Representatives of Maori groups and Lego have reportedly met to discuss the development of an international self-regulating code of conduct for toy manufacturing companies.[32]

37. Traditional cultural expressions can be an important source of income for Indigenous artists, musicians, craftsmen and other creators. As a recent Australian report, published by the Department of Communications, Information Technology and the Arts, stated, visual arts and crafts are an important source of income for Indigenous artists and communities, and the level of copyright and other IP protection they enjoy is of utmost importance to them. It is estimated that the Indigenous visual arts and crafts industry has a turnover of approximately US$130 million in Australia, of which Indigenous people receive approximately US$30 million in returns.[33]

III. OBJECTIVES OF INDIGENOUS PEOPLES AND TRADITIONAL COMMUNITIES

38. During WIPO's fact-finding and other consultative processes, Indigenous peoples and traditional communities articulated several objectives in relation to the use of their traditional literary and artistic productions, the subject of a detailed report.[34] This section will

---

29 Lobo, Susan, The Fabric of Life: Repatriating the Sacred Coroma Textiles, Cultural Survival Quarterly, Summer 1991, pages 40 and 41

30 Sandler, *op. cit*., pages 41 to 44.

31 "We have been impressed by the willingness of Lego to recognise a hurt was inadvertently made and show that in their actions," in Osborn, Andrew "Maoris win Lego battle," *The Guardian*, October 31, 2001 at <http://www.guardian.co.uk/Archive/Article/0,4273,4288446,00.html>

32 See response to Folklore Questionnaire by New Zealand, and http://news.bbc.co.uk/1/hi/world/asia-pacific/1619406.stm

33 Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, pages 116 and 135.

34 See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001); Kuruk, P., "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States," 48 American University Law Review 769 (1999); Janke, T., Our Culture, Our Future (Report prepared for the Australian Institute of Aboriginal and Torres Strait

[Footnote continued on next page]

summarize the needs and objectives expressed during these consultations, without purporting to speak for Indigenous peoples and traditional communities, who expressed a wide range of concerns from diverse perspectives. The following section examines several specific and concrete cases to see to what extent existing IPRs have been or could be successful in meeting those needs.

39. The desired objectives may be summed up as the desire for legal recognition of the right to own and control access to and the disclosure and use of traditional cultural expressions in accordance with customary laws and protocols. Implicit in this generally stated objective is the right to require prior and informed consent for any access to or disclosure and use of traditional cultural expressions.

40. Flowing from this generally stated objective, certain more specific ones can be identified, such as:

(i) to be regarded as the primary guardians and interpreters of their cultures and arts, whether created in the past, or developed by them in the future;

(ii) the ability to protect, in a positive sense, their traditional cultural expressions, which, where collectively owned, should be protected in the name of the relevant community;

(iii) the right to authorise or refuse to authorise the use, whether commercial or not, of traditional cultural expressions;

(iv) the right to maintain the secrecy of secret cultural expressions and practices and to safeguard sacred expressions and practices;

(v) the right to benefit commercially from the authorised use of traditional cultural expressions, including the right to negotiate terms of such usage;

(vi) the right to full and proper attribution, including the right not to be falsely attributed;

(vii) the right to prevent the derogatory, culturally offensive and fallacious use of traditional cultural expressions;

(viii) the right to prevent the distortion and mutilation of traditional cultural expressions; and

(ix) the right to authorise and control the collection and recording of traditional cultural expressions, and the subsequent dissemination and use of such recordings.

[Footnote continued from previous page]

Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1999); McDonald, I., Protecting Indigenous Intellectual Property (Australian Copyright Council, Sydney, 1997,1998),

41. Other related objectives and needs are to promote respect for and the preservation of forms of traditional creativity and cultural expressions, and to ensure that normal and continued customary use of them is not interfered with.

42. As noted in earlier Committee documents,[35] these objectives or desired rights may be broadly categorized into two main sets of needs and concerns:

(i) First, some Indigenous and traditional persons wish to benefit from the commercialization of their cultural expressions. They wish for protection of their cultural expressions in order to be compensated for their creativity, and to exclude non-Indigenous or non-traditional competitors from the market. This group may be said to desire "positive protection" of their cultural expressions.

(ii) Second, some are more concerned with the cultural, social and psychological harm caused by the unauthorized use of their art. They wish to control, and even prevent altogether, the use and dissemination of their cultural expressions. For this group, the commercial exploitation of their cultural expressions will cause them to lose their original significance which will in turn lead to a disruption and dissolution of their culture. This group may be said to desire "defensive protection" of their cultural expressions.

43. The consultations have highlighted that IP approaches may not address all the various objectives articulated in respect of folklore and traditional cultures. IP-type solutions may meet some objectives, but fail to promote others. To some extent these concerns go beyond the scope of legal protection of expressions of traditional cultures altogether, whether through existing IP systems, expanded or adapted IP rights, or through distinct *sui generis* legal protection. Nonetheless, the development and strengthening of national, regional and international systems for the legal protection of expressions of folklore should seek to take into account these diverse objectives.

IV. SYSTEMATIC ANALYSIS OF USE OF EXISTING INTELLECTUAL PROPERTY RIGHTS AND *SUI GENERIS* APPROACHES

(i) Literary and Artistic Productions – Copyright Law

Traditional cultural expressions as "productions in the literary and artistic domain"

44. Copyright protection is available for "literary and artistic works" as referred to in the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the Berne Convention).[36] The Convention makes clear that all productions in the literary, scientific and

---

[35] WIPO/GRTKF/IC/2/8, para. 33; WIPO/GRTKF/IC/2/16, par. 169; WIPO/GRTKF/IC/3/10, paras. 34 and 100.

[36] Article 2.1 of the Berne Convention: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without

[Footnote continued on next page]

artistic domains are covered, and no limitation by reason of the mode or form of their expression is permitted. The Convention gives an enumeration of the works protected; the list illustrates works included in the definition, and is not limitative.

45. Many of the expressions of traditional culture that Indigenous peoples and traditional communities desire protection for (see the examples in Section II) are "productions in the literary, scientific and artistic domain," and therefore, in principle, constitute the actual or potential subject matter of copyright protection. Examples would include: music and songs, dances, plays, stories, ceremonies and rituals, drawings, paintings, carvings, pottery, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes, musical instruments, architecture, sculptures, engravings, handicrafts, poetry, and designs.

46. The protection provided by copyright (the economic rights to prevent or authorize, *inter alia*, the reproduction, adaptation, communication to the public and others, and the moral rights of attribution and integrity) seems well suited to meeting many of the needs and objectives of Indigenous peoples and traditional communities. The possibility under copyright to be compensated for use of traditional cultural expressions either through receiving royalties or through damages for infringement also meets certain needs and objectives. As a result, several Committee Members have highlighted the need to explore fully the use of existing IPRs, such as copyright, to protect expressions of traditional culture.

Limitations on the use of copyright

47. Other Members of the Committee have pointed to certain aspects of copyright law that they suggest limit its potential for protecting traditional cultural expressions:[37]

(i) Copyright protects only original works, and many traditional literary and artistic productions are not original. Hungary, for example, stated in its response to the folklore questionnaire: ". . . an expression of folklore can never be a work of authorship, since its main characteristic is not the reflection of the unique personality of an author, but the unchanged representation of the features of cultural public domain."[38]

[Footnote continued from previous page]

words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." See also articles 2(3), 2(4) and 2(5) where the requirement to protect certain other kinds of works is dealt with.

37 WIPO/GRTKF/IC/1/5 (Document submitted the Group of Countries of Latin America and the Caribbean (GRULAC)); WIPO/GRTKF/IC/3/11. (Document submitted by the European Community and its Member States); Responses to the folklore questionnaire (WIPO/GRTKF/IC/2/7) and/or the TK survey (WIPO/GRTKF/IC/2/5) of Australia, Bhutan, Hungary, Indonesia, New Zealand, Norway, Panama, Peru, the Philippines, Republic of Korea, Samoa, Singapore, the Solomon Islands, Viet Nam and others.

38 Response of Hungary to folklore questionnaire, page 2. All the responses are available at http://www.wipo.int/globalissues/questionnaires/ic-2-7/index.html

(ii) Copyright requires the identification of a known individual creator or creators. It is difficult, if not impossible, to identify the creators of traditional cultural expressions because they are communally created and held and/or because the creators are simply unknown. As the European Community and its Member States stated in their document on "Expressions of Folklore" submitted for the Committee's third session: "copyright is based on the identification of the person originating the work, whereas folklore is distinguished by the anonymity of the originator of the tradition or by the fact that the tradition is the attribute of a community."[39]

(iii) The conception of "ownership" in copyright law is incompatible with customary laws and systems. While copyright confers exclusive, private property rights in individuals, Indigenous authors are subject to complex rules, regulations and responsibilities, more akin to usage or management rights, which are communal in nature.[40] The complex of rights regulating the production of Indigenous cultural materials has been described by an Indigenous artist in the Australian case *M*, Payunka, Marika and Others v Indofurn Pty Ltd*[41] as follows:

> "As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image in trust for all the other Yolngu with an interest in the story."[42]

(This case – the so-called Carpets case - is one of the subjects of the studies conducted for WIPO by Ms. Terri Janke entitled "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions." They are available at http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html.)

McDonald quotes a useful illustration of the nature of ownership of cultural rights under customary law: customary 'ownership' is analogous to the rights of an employee in a work created in the course and scope of employment (this illustration references those jurisdictions in which copyright in employee's works is held by the employer). In a broad sense, an employee is 'empowered' to create a work 'owned' by the employer; the employee is then only able to use or develop the work in accordance with the authority vested by the employer.[43]

This divergence between "ownership" in the copyright sense and communal "usage" rights and responsibilities has practical meaning in licensing cases for example. An Indigenous copyright owner would be entitled under copyright law to license or assign his or her rights to a third party, but under customary rules and regulations this may not be permissible. The Australian case of *Yumbulul v Reserve Bank of Australia*[44] is relevant here.

---

39 WIPO/GRTKF/IC/3/11., page 3.
40 See WIPO/GRTKF/IC/3/11. page 3; McDonald, p. 45.
41 (1994) 30 IPR 209.
42 At page 215, quoted in McDonald, *ibid.*
43 McDonald, p. 46.
44 (1991) 21 IPR 481.

(iv) The fixation requirement in copyright prevents intangible and oral expressions of culture, such as tales, dances or songs, from being protected. Even certain "fixed" expressions may not meet the fixation requirement, such as face painting and body painting.[45]

(v) The limited term of protection in copyright is claimed to be inappropriate for expressions of folklore and traditional cultures. First, it fails to meet the need to protect expressions of folklore in perpetuity. And, the limited term of protection requires certainty as to the date of a work's creation or first publication, which is unknown in the case of pre-existing traditional cultural expressions.[46]

The originality requirement

48. Although the Berne Convention does not say so explicitly, it is apparent from Article 2.1 that protected works must be intellectual creations, and this is reinforced by the use of these words in Article 2.5. For this reason, many national laws provide that works must be 'original.' And, as noted above, several States and others argue that this requirement prevents the protection of expressions of folklore by copyright.

49. But, what does "originality" really mean? The term is not defined in the relevant international treaties, nor is it generally defined in national laws. It is rather a matter left for determination by the courts in relation to particular cases. But it seems that it does not, for example, mean the same as 'novelty' as understood in patent law. Although some differences may exist between the civil law and common law legal systems on this point, it may be said that in both legal systems a work is 'original' if there is some degree of intellectual effort involved and it has not been copied from someone else's work.[47]

50. At least in the common law jurisdictions, a relatively low level of creativity is required in order to meet the originality requirement. As a result, the originality requirement may not pose an insurmountable hurdle in relation to contemporary forms of expressions of traditional culture, being new productions made by current generations of society and inspired by or based upon pre-existing Indigenous or traditional designs. The cases referred to by Australia in its response to the folklore questionnaire are good examples of this. See for example *M*, Payunka, Marika and Others v Indofurn Pty Ltd*,[48] where the Court had no difficulty in holding that the artworks before it were original:

---

45 See also McDonald, p. 42 and Ellinson, Dean "Unauthorised Reproduction of Traditional Aboriginal Art," UNSW Law Journal, 1994, p. 333.

46 Responses to the folklore questionnaire (WIPO/GRTKF/IC/2/7) and the TK survey (WIPO/GRTKF/IC/2/5) of Hungary, New Zealand, Norway, and Vietnam.; WIPO/GRTKF/IC/3/11. (Document submitted by the European Community and its Member States), page 3.

47 Palethorpe and Verhulst, page 28; Goldstein, P., p. 161; see also Ricketson, S., The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (London, 1987), pp. 228 to 234.

48 (1994) 30 IPR 209. This is the so-called Carpets Case. It is one of the subjects of the studies undertaken for WIPO by Ms. Terri Janke entitled "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, available at http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html.

> "Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality."[49]

51. Although the relevant Australian cases all concerned the visual arts, there seems to be no reason why the results would be different in other areas, such as music. It seems to make no difference that the author of such a work may have been subject to customary rules and regulations concerning how, when and for what purpose the work could be created – viewed independently, and from within the copyright paradigm, the work can be 'original.'

52. Therefore, it may be said that, at least in so far as common law jurisdictions are concerned, contemporary expressions of folklore inspired by or based upon pre-existing folklore are sufficiently original to be protected as copyright works.

53. The law makes no distinction according to the identity of the author – i.e., the originality requirement could be met whether or not the author of the contemporary expression of folklore is a member of the relevant cultural community in which the tradition originated. This may trouble Indigenous and traditional communities, who may wish to restrict the ability of non-Indigenous or non-traditional persons (or, more precisely, persons not from the relevant cultural community) from enjoying copyright in tradition-based creations. Whether a person not from the relevant community ought to be denied copyright on that ground alone raises some serious policy questions. However, it is possible to develop parallel means of determining whether a person not from the relevant community (assuming that the relevant community could be identified) should have some obligations towards that community attached to his or her copyright (such as to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying traditions used). This is discussed further below under "Policy questions and *sui generis* approaches."

54. However, the position is more complex with unoriginal imitations or mere recreations of pre-existing folklore, which are unlikely to meet the 'originality' requirement. They remain in the public domain from the perspective of the copyright system. For example, in its response to the folklore questionnaire, Hungary gave an example from the jurisprudence of the Supreme Court, regarding the nature of the protection afforded to expressions of folklore in Hungary:

> "In 1977, the Supreme Court had decided on the issue whether the known "author" of a "folk tale" had created an individual and original work. The Court held that as regards folk tales, originality and authorship must be judged taking into account the special rules of folk poetry. In this respect, first of all the variability of folk tales is important: folk tales are handed down and maintained orally, therefore they are exposed to continuous changes. A tale-teller is not entitled to copyright protection if his role in the formation of tales does not go beyond the traditional frames of telling tales."

55. Similarly, Kutty reports on a case in Indonesia involving a decorated wooden mask of Indonesian dancers, of folk creation, being manufactured and marketed in a foreign market for commercial gain. In fact, two different commercial groups indulged in the marketing of these

---

[49] (1994) 30 IPR 209 at p. 216.

artistic items. The aggressive competition between the two firms motivated one of the parties to claim copyright over the mask in question. The affected party objected to the claim of the first firm. Copyright in the mask was not recognized on the grounds that the artistic creation belonged to the people of Indonesia.[50]

56. Whether or not States wish to provide some form of protection for this public domain material is first and foremost a policy question, discussed further below.

57. If a State wishes to do so, it could look at how have existing *sui generis* systems have dealt with the originality issue. Generally, these *sui generis* systems are not conceived as part of copyright *strictu sensu* and they do not require originality. For example, the Model Provisions, 1982 make no reference to an originality requirement; consequently, nor do many of the national copyright laws which have implemented them. Similarly, the law of Panama makes no reference to an originality requirement, and nor does the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture developed by Pacific Island countries.

The identifiable author requirement

58. Copyright does not only protect individual creators. Copyright can protect groups of creators – in fact, today, it is quite common for more than one person to create a single copyright work. Different forms of copyright, owned by different parties, can also inhere in the one production. However, under copyright it is necessary that the creator or creators be identifiable and, in the case of multiple creators, be organized in the form of a company, association, trust or the like.

59. In respect of new cultural expressions, there is almost always an identifiable creator, or creators, and this requirement is generally met. The Australian cases are once again good examples of this. Where there is no identifiable creator, such as in the case of pre-existing folklore, this is more difficult and copyright protection is unlikely. However, copyright law has been reasonably creative in overcoming the "identifiable author" requirement in certain other cases. For example, copyright provides protection for anonymous and pseudonymous works in Article 7.3 of the Berne Convention. But, the last sentence of the Article renders that form of protection less relevant for pre-existing folklore:

> "The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years."

60. These means for dealing with the identifiable author requirement presupposes the existence of an "author", however. Although one could argue that some pre-existing folklore must have had an 'author' at some stage, it is likely that for most pre-existing folklore, there was and is no 'author' in the copyright sense. In the case therefore of pre-existing folklore, one is not generally dealing with truly anonymous works, in the sense that there is an author

---

[50] Kutty, P. V., "*Study on the Protection of Expressions of Folklore*," study prepared for the World Intellectual Property Organization (WIPO). Soon to be available at http://www.wipo.int/globalissues/cultural/index.html

but his or her identity is unknown. In the case of many expressions of traditional culture, the whole context of authorship may not be sufficiently determinate to be anchored in copyright law. Nonetheless, there is the possibility of using the possibility under Article 15.4 of the Berne Convention for protection of works where the identity of the author is unknown. This Article is discussed at some length in the Report on National Experiences.[51]

61. Whether or not States wish to provide for general groups of unknown individuals to be able to acquire and exercise copyright or similar rights in traditional cultural expressions is a matter for policy discussion and choice. Doing so in a general IP law context may be possible, as existing *sui generis* systems suggest:

(i) The 1982 Model Provisions recognize the possibility of collective or community rights. Being a *sui generis* system and not a copyright system, they do not refer to "authors" of expressions of folklore. They do not even refer directly to the "owners" of expressions of folklore. Rather, they state that authorizations for using expressions of folklore should be obtained either from an entity (a "competent authority") established by the State (this option creates a fiction that the State is the "author" and/or the "owner" of the rights in the expressions) or from the "community concerned" (Section 10). In short, the Model Provisions do not require there to be an identifiable "author" or "authors."

(ii) Similarly, the Tunis Model Law on Copyright, in so far as it addresses works of national folklore (as opposed to works derived from folklore) states that the rights granted by it in folklore shall be exercised by a Government appointed authority (section 6).

(iii) The Panama law provides for the protection of the "collective rights of the indigenous communities," and applications for registration of these rights shall be made by "the respective general congresses or indigenous traditional authorities."

(iv) The South Pacific Model Law vests "traditional cultural rights" in "traditional owners," defined as the group, clan or community of people, or an individual who is recognized by a group, clan or community of people as the individual, in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community. These rights are in addition to and do not affect any IPRs that may subsist in the expressions of culture.

62. However, while it seems possible in law to establish mechanisms that vest rights in communities or in the State (obviating the need to identify an "author"), the effectiveness of such provisions depends upon practical considerations, such as the organizational capital of communities, their knowledge of and access to the law, the resources they have to manage and enforce their rights, and so on. It is here that collective management may be able to play a role.

---

[51] See further the Final Report on National Experiences (WIPO/GRTKF/IC/3/10), paras. 12, 13 and 165.

Different conceptions of "ownership"

63. This alludes to the relationship between an individual artist/author as a copyright holder, and the individual artist as a member of an Indigenous community. Different conceptions of "ownership" within copyright law, on the one hand, and customary laws and protocols, on the other, find practical meaning particularly in those cases where an Indigenous artist is entitled to and subject to copyright rules and simultaneously subject to parallel customary rules and regulations. While IPRs confer private rights of ownership, in customary discourse to "own" does not necessarily or only mean 'ownership' in the Western non-Indigenous sense. It can convey a sense of stewardship or responsibility for the traditional culture, rather than the right merely to exclude others from certain uses of expressions of the traditional culture, which is more akin to the nature of many IP rights systems.[52]

64. This tension between private rights of ownership under copyright and communal ownership held by artists and their communities has received judicial attention. In the Australian *Yumbulul* case referred to earlier, the court concluded that "the question of statutory recognition of Aboriginal community interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators."[53]

65. It was directly addressed in one of the cases Australia referred to in its response to the folklore questionnaire, *John Bulun Bulun v R and T Textiles*.[54] The pertinent aspect of this case related to a claim by the clan group to which the individual artist belonged that it in effect controlled the copyright in the artwork, and that the clan members were the beneficiaries of the creation of the artwork by the artist acting as a trustee on their behalf. Accordingly, they claimed to be entitled to a form of collective right with respect to the copyright in the work, over and above any issue as to authorship. The court, in a comprehensive *obiter dictum*, found that the artist had a fiduciary duty towards his clan group. While the artist was entitled to pursue the exploitation of the artwork for his own benefit, he was still required by reason of this fiduciary duty to not take any steps which might harm the communal interests of the clans in the artwork. Golvan continues:

> "[The court] noted that, while the artist had availed himself of the appropriate remedies, had he not been in a position to do so equitable remedies would have been available to the clan. Thus, had the artist failed to take necessary action, a remedy might be extended in equity to the beneficiaries by allowing them to bring an action in their own names against the infringer and the copyright owner. In such circumstances equity would impose a constructive trust on the legal owner of the copyright in favor of the clan as beneficiaries."[55]

---

52 See Janke, *op. cit*, page 44.

53 At page 492.

54 (1998) 41 IPR 513. This case is also one of the cases studied by Ms. Terri Janke in her study "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions" commissioned by WIPO, and will soon be available at http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html.

55 Golvan "Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments", E.I.P.R, 1999, p. 602.

66. This question requires further consideration. Many argue that ways have to be found to manage the relationship between copyright protection and the customary responsibilities. Divergences between IP law and customary laws and protocols have been one of the motivations behind the development of *sui generis* systems. The laws of Panama and the Philippines (described in the Final Report on National Experiences at par. 121) make direct references to customary law.

67. It is also however pointed out by some that this question is relevant largely in relation to Indigenous peoples and communities which acknowledge customary law, and that it does not apply to other traditional communities. In addition, to assume that there is a generic form of collective/community custom-based proprietary systems would be misleading, since it would ignore the tremendous diversity of traditional proprietary systems, many of which are highly complex.[56]

68. It could perhaps be argued that customary rules should be treated no differently to the rules of other non-IP laws with which IP rules may appear to conflict. For example, morality laws may prohibit the publication of pornographic photographs, yet copyright law grants the author rights over the reproduction and publication of the photographs. However, there is no conflict – copyright law does not grant a rightholder the positive entitlement to exercise rights; rather, it enables the rightholder to prevent others from exercising the rights (or to authorize them to do so). Whether or not a rightholder is entitled to exercise his or rights may depend upon other laws, as Article 17 of the Berne Convention makes clear:

> "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."

69. Therefore, it could be argued by analogy that there is no "conflict" between copyright and customary laws, because, in the event that customary laws were to be recognized for this purpose by a country's laws, copyright does not entitle or oblige a traditional artist to act contrary to his or her customary responsibilities.

70. These questions are the subject of a study that will be undertaken by the Secretariat of WIPO, as outlined in the Final Report on National Experiences and approved by the Committee at its third session. The study will aim at identifying in which circumstances and in what manner it may be appropriate for copyright and other forms of protection relevant to cultural expressions to take into account customary laws and protocols. Lessons learned from the study will be integrated into the legal-technical cooperation program being undertaken by the WIPO Secretariat and the "WIPO Practical Guide on the Legal Protection of Traditional Cultural Expressions."

---

[56] Dutfield, "Protecting Traditional Knowledge and Folklore," draft, (UNCTAD/ICTSD), page 14.

The fixation requirement

71. According to general international principles, copyright protection is available for both oral and written works. Article 2.1 of the Berne Convention provides that among the kinds of productions protected as copyright are included "lectures, addresses, sermons and other works of the same nature." Although the words "of the same nature" may restrict the range of oral works that may be protected to those similar to lectures, addresses and sermons, Article 2.2 of the Convention makes it clear national laws need not provide that fixation in some material form is a general condition for protection.

72. Yet, many national laws, particularly the common law countries, do so because fixation proves the existence of the work, and provides for a clearer and more definite basis for rights. However, this is not a treaty requirement, and in fact, many countries do not require fixation, such as Spain, France and Germany and other civil law countries in Latin America and elsewhere.

73. Thus, a mandatory requirement for fixation is not a necessary element of copyright law, and States are free to provide that works in general or traditional cultural expressions in particular do not need to be fixed in some material form in order to be protected. This has been done – for example, the Tunis Model Law, 1976 rules out any possibility of demanding fixation for a work of folklore. The drafters felt that works of folklore are often by their very nature in oral form and never recorded, and to demand that they be fixed in order to enjoy protection puts any such protection in jeopardy and even, according to the commentary to the Model Law, risks giving the copyright to those who fix them. Fixation is not a requirement of the 1982 Model Provisions, the law of Panama nor the South Pacific Model Law. In any event, where the fixation requirement exists, it poses a problem only for intangible expressions of folklore.

Limited term

74. The duration of copyright protection generally extends to 50 years after the death of the author, or 70 years in some jurisdictions. The Berne Convention stipulates 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods. However, it is generally seen as integral to the copyright system that the term of protection not be indefinite; the system is based on the notion that the term of protection be limited, so that works ultimately enter the public domain. However, many Indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures, and in this respect the copyright system does not meet their needs.

75. Indefinite protection is not a new concept in IP law,[57] and States may choose to establish systems that provide for some form of indefinite protection for literary and artistic productions, although this would create some tension with general policy and legal assumptions about the copyright system. The Model Provisions, 1982 themselves do not

---

[57] Trademark and geographical protection can continue indefinitely (subject to certain conditions). The early House of Lords decision of *Millar v. Taylor* (4 Burr. (4th ed.) 2303, 98 Eng. Rep 201 (K.B. 1769)) provided for perpetual copyright, but this principle was superseded by later judgements.

provide for any time limit, and nor do the laws of Panama or the model law of the Pacific Island countries. Whether or not a State wishes to follow this approach is a question of policy. It is discussed further below.

Concerns that copyright fails to provide defensive protection

76. While the arguments discussed so far deal more with the inability of copyright to provide positive protection, there are claims that current copyright law has shortcomings that limit the capacity of Indigenous and traditional persons to prevent the use of their literary and artistic productions by others (i.e., copyright law fails to provide 'defensive' protection in the sense described in Part III).

(i) While the copyright system treats expressions of folklore as part of the public domain, non-Indigenous and non-traditional persons are able to acquire copyright over "new" folkloric expressions or folkloric expressions incorporated in derivative works, such as adaptations and arrangements of music.

(ii) Even in respect of those contemporary folkloric expressions that are copyright works, the exceptions typically allowed under copyright can undermine customary rights under customary laws and protocols – for example, national copyright laws typically provide that a sculpture or work of artistic craftsmanship which is permanently displayed in a public place may be reproduced in photographs, drawings and in other ways without permission. It has been pointed out that the effect of public display upon certain works may not be well known among Indigenous and traditional artists.[58] Similarly, national copyright laws often allow public archives and libraries and the like to make reproductions of literary and artistic works and keep them available for the public. However, doing so in respect of copyrighted traditional cultural expressions may raise parallel cultural and Indigenous rights issues (discussed further below in section on " Collection, recordal and dissemination of traditional cultural expressions – copyright and related rights").

(iii) Copyright protection does not extend to "style" or method of manufacture, yet, as GRULAC stated in its submission to the first session of the Intergovernmental Committee, the method of manufacture and "style" of traditional products are vulnerable to imitation.[59]

(iv) The remedies available under current law may not be appropriate to deter infringing use of the works of an Indigenous artist-copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use.

77. Further consideration may be necessary to clarify and examine practical options for those aspects of current copyright law and practice that are seen to clash with or undermine Indigenous or other customary rights, responsibilities and practices.

---

58 McDonald, I., Protecting Indigenous Intellectual Property (Australian Copyright Council, Sydney, 1997, 1998), p. 44.

59 WIPO/GRTKF/IC/1/5, Annex II, pp. 7 and 8.

78. In so far as style and method of manufacture go, copyright protection does not extend to the style, colors, subject matter and techniques used to create a work. This is a fundamental and long-standing principle reflected in copyright laws worldwide. There are limits to that which can be protected by copyright, as Article 9.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) makes clear: "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." Copyright therefore permits the imitation of the style of works, which is a widespread practice as creativity is nourished and inspired by other works.

79. Therefore, even if copyright were to vest in a new tradition-based cultural expression, copyright protection would not *per se* prevent the "style" of the protected work from being appropriated. Other branches of IP law may be more useful, however, such as the law of unfair competition, and the common-law tort of passing off, although there is little experience reported in the application of these concepts to imitation of Indigenous styles. This is discussed elsewhere in this document.

80. These type of questions could also be addressed in *sui generis* systems, should a State choose to establish such a system. Or they could form the subject of specific amendments to national copyright laws, although why special protection of the "style" of traditional cultural expressions would be justified while the style of (other) copyright works is not protected would raise certain legal and policy questions.

81. As these issues are linked to larger divergences between customary forms of "ownership" and IP rights, they will also be addressed in the study that the WIPO Secretariat will commission on this subject as already mentioned.

Certain tentative conclusions

82. The originality and identifiable author requirements of copyright do not seem to prevent the protection of tradition-based cultural expressions made by current generations of society (referred to as "contemporary" cultural expressions), whether or not made by Indigenous and traditional persons. The fixation requirement, in so far as it exists in certain national laws, prevents however the protection of intangible contemporary cultural expressions.

83. So, as a form of tentative conclusion, it may be stated that copyright protection is available for tangible, contemporary traditional cultural expressions. In addition, intangible expressions are also protected in countries not requiring fixation.

84. However, the limited term of protection and the certain other features of copyright (such as that it does not protect style or method of manufacture, or invocation of a particular cultural heritage) may make copyright protection less attractive to Indigenous peoples and traditional communities and individuals. In addition, divergences between the rights of a copyright holder and parallel customary responsibilities can cause difficulties for Indigenous creators. Therefore, while copyright protection is possible in certain cases, it may not meet all the needs and objectives of Indigenous peoples and traditional communities.

85. For those States that do not wish to provide any further protection for traditional cultural expressions beyond that already provided by copyright, further efforts could be directed towards enabling and facilitating access to and use of the copyright system by

Indigenous peoples and traditional communities. As previously discussed (see WIPO/GRTKF/IC/3/10, par. 153 (ii)), various suggestions have been made in this connection, such as improved awareness-raising and training, legal aid, assistance with enforcement of rights, and use of collective management. See also Part V below.

86. In so far as pre-existing traditional cultural expressions are concerned, and mere imitations and recreations thereof, they are unlikely to meet the originality and identifiable author requirements. They remain for copyright purposes in the public domain.

87. States which wish to provide fuller protection for traditional cultural expressions beyond current copyright could either consider whether certain amendments to copyright law and practice are necessary and justified, and/or they may consider establishing *sui generis* systems, as some have already done.

88. While it may be possible to improve upon the protection already provided by copyright to contemporary tradition-based cultural expressions by means of amendments to copyright law and practice, it seems that a more thorough evolution of existing standards in the form of a *sui generis* system may be necessary in order to protect pre-existing folklore. However, whether to embark on this route raises several policy questions, the subject of the next section.

Policy questions and sui generis approaches

89. Aside from the more technical questions discussed in the earlier sections, several Committee participants have queried from a policy perspective whether or not there should be legal protection of an IP nature for traditional cultural expressions beyond that already provided by existing rights.

90. The European Community and its Member States have stated for example:

> "The exploitation of expressions of folklore, even on a commercial scale, by persons outside the region where the folklore originates, has not been seen to have a negative impact. On the contrary, it has stimulated cultural exchange and fostered regional identities. As a consequence, authentic expressions of folklore have become inherently better known and of higher economic value. However, those who advocate IP protection for their own expressions of folklore would create monopolies of exploitation and would naturally then be faced with monopoly claims from other regions. Exchange or interaction could thus be made more difficult, if not impossible. Indeed, IP protection should only be used where appropriate and beneficial to society in that it stimulates creativity and investment while respecting the interests of others and of society at large. If expressions of folklore were fully protected, this could almost have the effect of casting it in concrete. Folklore may thus not be able to evolve and may risk its very existence as it would lose one of its main features: its dynamics.
>
> "There is a point where a line must be drawn between the public domain and protected IP. As has been exposed by the European Community and its Member States on previous occasions, and notably in WIPO at the two previous meetings of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and

Folklore, the realm of IP protection should not be extended to a point where it becomes diffuse and legal certainty diluted."[60]

91. Similar views have been expressed by certain other States.[61]

92. On the other hand, Indigenous peoples and traditional communities argue for both positive protection over their folklore, as well as, if not moreso, for defensive protection, in the sense described in Part III. In this respect, one of the primary concerns regarding cultural expressions is to prevent their adaptation or the borrowing of their "style," particularly by non-traditional communities. The concerns and objectives discussed in Part III regarding derogatory, offensive and fallacious use are relevant here too, and calls are made to strictly control derivative works, being works inspired by or based on folklore expressions. At least, Indigenous peoples and traditional communities would argue for the right to be acknowledged and attributed if their expressions are used in an unauthorized and/or inappropriate manner.

93. Of course, the copyright protection of tradition-based cultural expressions (new or "contemporary" expressions of traditional culture) depends upon the designation of pre-existing folklore as part of the public domain. Therefore, both Indigenous and non-Indigenous artists, composers and the like benefit from this situation. If property rights were to be established over public domain pre-existing folklore, then both Indigenous and traditional persons, as well as non-Indigenous and non-traditional persons, would (depending on the nature of the property rights and exceptions to them) require authorization to make so - called derived works (in the same way perhaps as adaptators of copyright works require consent because of the exclusive right of adaptation in Article 12 of the Berne Convention).

94. It would seem that a balance needs to be struck between offering a form of protection that meets the needs of Indigenous peoples and traditional communities, while also (i) enabling access to cultural heritage and cultural expressions so that they may be a legitimate source of inspiration for creativity and innovation and (ii) respecting IP rights of true authors (whether from the relevant community or not).

95. These sorts of policy questions seem to touch particularly upon certain key issues relevant to the conceptualization of *sui generis* systems, namely:

(i) delimitation of the subject matter for protection,
(ii) the nature of the rights granted,
(iii) exceptions to them, and
(iv) the relationship between the *sui generis* systems and existing IP rights.

96. Various approaches could be taken on these issues. At the one end of the spectrum, one could argue for there being no property rights whatsoever in folklore, so that it is can be freely used by all. Indigenous and traditional persons, as well as non-Indigenous and non-traditional persons, would be able to exploit folklore for their own benefit and would, where possible, be able to acquire and exercise copyright in respect of any "new" works based on or inspired

---

60 WIPO/GRTKF/IC/3/11..

61 For example, Canada; Ecuador; Kyrgystan; Malaysia; Mexico; the Republic of Korea; Romania; Switzerland; and the United States of America.

from folklore without any restriction, including without any obligations to the source communities.

97. At the other end of the spectrum, there would be exclusive property rights in folklore. Any copyright-type uses of folklore would require prior authorization. Such an approach may also provide that copyright or any other IP rights in creations made from using the folklore would vest in the 'owners' of the folklore, not in the creator.

98. However, there are other options between these two extremes that could perhaps achieve the kind of balances needed. It would seem that a balanced system for the protection of "public domain folklore" (expressions of folklore not protected by copyright or other IPR's) could:

(i) enable and facilitate access to and use of expressions of folklore as a basis for further creativity and innovation, whether by members of the relevant cultural community or not;

(ii) in such cases, respect any resulting IP rights of the creators and innovators;

(iii) ensure however that such uses of folklore, particularly commercial uses, are coupled with obligations by the user to acknowledge the source of the folklore, share equitably in any benefits derived from the use of the folklore and not to make derogatory or fallacious uses of the folklore under any circumstances; and,

(iv) notwithstanding the above, protect sacred and secret expressions against all forms of use and commercial exploitation.

Comments on policy issues

99. A *sui generis* system, however balanced, may of course create new rights in what is presently regarded as the public domain. This is in effect a type of *domaine public payant* approach, which several States and stakeholders argue is suitable for expressions of folklore. Contemporary calls for a *domaine public payant* system are not confined to the area of traditional cultural expressions – in 1998, for example, the German Media Union adopted a new proposition for the introduction of a "communal paying public domain right of authors and performers."[62] The proposition is for the collective management of rights in works and performances in the public domain for the benefit of living authors and performers.

100. Account should be taken of objections that have been raised to a *domaine public payant* approach. For example, in its comments on the Draft WIPO Fact-Finding Mission (FFM) Report and at sessions of the Intergovernmental Committee, the International Publishers Association (IPA) has expressed opposition to this form of protection and stated that it could hinder the dissemination and creative adaptation and transformation of expressions of folklore. The representative stated that in preventing aged knowledge and expressions from falling into the public domain after a protection term or defined period of time, the *domaine*

---

[62] See Dietz, A., "Domaine Public Payant," 1998.

public payant system would undermine their publishing members' efforts to develop viable industries.[63]

101. Rights in "public domain" traditional cultural expressions could be managed by the State or a State-appointed authority, but need not be. The objective must surely be to ensure that any benefits flow to the correct people – the creative communities or individuals whose cultural expressions were used. Existing or new collective management organizations could play an important role in managing the rights for the direct benefit of the relevant communities.

102. The rights could, but need not be, exclusive rights. They could be rights of remuneration only, and perhaps these kind of rights strike the right balance. In such cases, prior authorization for use of the folklore would not be required. Folklore would remain accessible and available to be used as a source of creativity and innovation, subject to certain obligations, such as acknowledgement of the source community and/or country in which the folklore originated, a reasonable royalty, and protection against derogatory and fallacious use, as suggested above.

103. This document has referred rather loosely to "Indigenous peoples" and "traditional communities" as the holders of traditional cultural expressions, and "non-Indigenous peoples" and "non-traditional communities" as the persons who misappropriate them. Of course this is a vast over – simplification. Misappropriations may be committed by Indigenous peoples of the same country or the same community, or by Indigenous peoples from other countries and regions. Similarly, traditional cultural expressions are held, practiced and conserved by persons who may not necessarily think of themselves as "Indigenous" or "traditional." In any event, the creation of a separate legal regime for Indigenous or traditional peoples, as against all other "non-Indigenous" or "non-traditional" persons, may not be acceptable as a matter of policy. The ultimate aim should probably be that traditional cultural expressions should be protected against use by all persons (Indigenous, traditional or otherwise) who are not legally recognized as the "owners" or "holders" of the expressions under national law or the relevant community's customary laws.

104. In the kind of approach towards a balanced system referred to above, the status of "non-traditional" creations that are in the public domain raises some complex policy questions. However, as discussed in the FFM Report[64], should traditional creations enjoy a privileged legal status *vis a vis* other public domain "non-traditional" knowledge? Separate IP rules for traditional and non-traditional creations may be difficult to sustain, but this is a policy matter for decision by States. It can also be noted that, since international treaties dealing with IP may include a national treatment obligation, any specialized regime for the protection of traditional cultural expressions would have to extend beyond local indigenous populations to all foreign nationals with which the country in question has treaty relations (national treatment is not necessarily always present - international protection may be determined on the principle of reciprocity). Therefore, an approach such as set out above may have to apply also to productions that were never protected by copyright (because they pre - dated copyright laws) and literary and artistic works in which copyright has expired – e.g., films, music, software, databases and so on. They too would be subject to a non-exclusive paying public

---

63 WIPO Fact-Finding Mission Report, page 226; WIPO/GRTKF/IC/3/17 Prov., par. 290.

64 See page 221.

domain right under the above approach. This would probably be taking such an approach too far. A possibility could be to argue that this paying public domain approach should apply only to traditional cultural expressions that have never been and are not, for one of the technical reasons discussed, protected by copyright.

105. As also noted in the FFM Report, the Final Report on National Experiences and elsewhere, there is a great need for awareness-raising programs and specialized training for Indigenous peoples and traditional communities in accessing, understanding and using IP rights, and the same would apply to *sui generis* systems. One of the operational difficulties often mentioned is the cost and complexity involved in dispute resolution. A possibility in this regard is to build into any *sui generis* system the possibility of using alternative dispute resolution (ADR). This has already been alluded to by certain groups of WIPO Member States in submissions to the Intergovernmental Committee.[65] See also Part V below.

106. While this part of the document has dealt with literary and artistic productions (copyright), other parts deal in a similar manner with other IP rights, such as distinctive marks (trademarks) and designs (industrial designs protection). A *sui generis* system would ideally deal comprehensively with all these various forms of traditional cultural expressions.

107. It is instructive to examine how existing *sui generis* systems have dealt with these main policy questions:

(i) The Model Provisions, 1982 create exclusive rights in expressions of folklore. However, no right of adaptation is provided for, and there is, in addition, an exception in respect of "*the borrowing of expressions of folklore for creating an original work of an author or authors.*"[66]

(a) Therefore, it is not possible under the Model Provisions to prevent the adaptation or 'borrowing from' of folklore. In addition, the acknowledgement of source provisions in Section 5 are not applicable to the "borrowing of" an expression of folklore in order to create an original work.

(b) It follows that under the Model Provisions the needs of Indigenous and traditional peoples for 'defensive protection' in respect of their traditional cultural expressions (such as for the right to prevent the adaptation and use of their expressions for the creation of new works by others, and the rights to prevent the derogatory, offensive and fallacious use of their expressions, and the right to be acknowledged and attributed) are not met.

(c) Some Committee participants have referred to several other shortcomings in the Model Provisions, and have called for their updating and improvement. The Committee did not approve further work in this area at its third session.

---

65 See WIPO/GRTKF/IC/2/10 (Asian Group and China) and WIPO/GRTKF/IC/3/15 (African Group).

66 Section 4 (1) (iii), Model Provisions, 1982.

(ii) The Panama Law (20 of 2000) recognizes exclusive collective rights of communities, and provides that no IPRs can vest in the their traditional cultural expressions "unless the application is filed by the indigenous community" (Article 2, unofficial English translation). The collective rights of the indigenous communities must be registered. Use and commercialization of traditional cultural expressions based on the tradition of the indigenous communities, "must be governed by the regulation of each indigenous communities, approved and registered…" (Article 15, unofficial translation). Certain exceptions are established, however, for "small non-indigenous artisans" who may continue doing business but may not claim the collective rights recognized by the law (Article 23, and see also Article 24, unofficial English translation).

(iii) The general approach taken by the South Pacific Model Law is to protect the rights of "traditional owners" in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including their commercialization, subject to prior informed consent and benefit-sharing. The model law successfully complements existing IPRs.

(a) The model creates new rights in traditional knowledge and expressions of culture which were previously regarded, for purposes of IP law, as part of the public domain. The rights created by the model law essentially fall into 2 categories: "traditional cultural rights" and "moral rights." These rights do not depend on any registration or other formalities.

(b) Traditional cultural rights grant traditional owners exclusive rights in respect of a range of uses of traditional knowledge and expressions of culture that are of a non-customary nature (irrespective of whether or not they are for commercial purposes). This includes the use of traditional knowledge and cultural expressions for the making of new creations and innovations based thereon (derivative works).

(c) The model establishes a procedure whereby consent can be obtained for the non-customary use of traditional knowledge and cultural expressions, including for the making of derivative works. If a derivative work is created, including by a non-customary user, any IPRs in it vest in the creator of the work or as otherwise provided for by IP law. In other words, IPRs are fully respected, and the model makes it clear that the rights it creates are in addition to and do not affect IPRs.

(d) However, should a derivative work or traditional knowledge and cultural expressions be used for commercial purposes, the user must share benefits with the traditional owners, provide acknowledgement of source and respect the traditional owners' moral rights.

(e) The moral rights created for traditional owners are the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expressions of culture.

(f) Apart from providing for exclusive rights as opposed to rights of remuneration, the South Pacific Model perhaps follows most closely the kind of approach described roughly above.

Regional and International Protection

108. The Report on National Experiences described certain existing mechanisms and frameworks for regional and international legal protection of expressions of folklore, concluding that these appear little used or known. The Report also noted that the majority of respondents to the WIPO folklore questionnaire of 2001 desire some form of international protection for expressions of folklore. A task proposed by the Secretariat to examine this question further was not approved by the Committee at its third session, however.

109. Most national laws provide a mechanism for the protection of foreign works, and it remains open to States in their establishment of national laws for the protection of traditional cultural expressions to provide for the protection of foreign expressions on the basis of national treatment or reciprocity. In this way, networks of national laws, each providing for reciprocal protection of foreign expressions of folklore, could eventually lead to sub-regional, regional and even inter-regional systems of protection.

(ii) Performances of Traditional Cultural Expressions – Performers' Rights

110. As noted in Section II, the examples of traditional cultural expressions that Indigenous peoples and traditional communities wish protection for include traditional performances, such as dances and plays.

111. Performers' rights, as recognized in the WIPO Performances and Phonograms Treaty (WPPT), 1996, protect performances of "literary and artistic works or expressions of folklore." Therefore, in principle at least, the kind of performances for which protection is sought are protected by international law, whether because they are literary and artistic works or expressions of folklore (it is notable that the protection for performances of literary and artistic works which is provided by the Rome Convention, 1961 and the TRIPS Agreement is not limited to works protected by copyright). As at July 25, 2002, 37 States had ratified the WPPT. It follows that performers of expressions of folklore in those Contracting States can expect to receive protection in the other Contracting States – an international system of protection for performances of expressions of folklore is therefore already in place. The WPPT grants performers both moral and economic rights, and these are set out in Articles 5 to 10 of the Convention.

112. It has often been suggested that the protection of performances of expressions of folklore might, indirectly, provide adequate protection for the expressions of folklore themselves. This is probably a fair expectation, provided the performer is from the same cultural community that is the "holder" of the expression of folklore. If not, the expression may still receive indirect protection, but any benefits will not accrue to the relevant community.

113. There are however some aspects of the protection of performers' rights that are less advantageous from the perspective of Indigenous peoples and traditional communities. Certain of these are drawn out in the illustrative example in the section below on "Collection, recordal and dissemination of traditional cultural expressions – copyright and related rights." Perhaps chief among them may be that the WPPT does not extend to the visual part of

performances. Only the aural parts are protected, that is, parts that may be perceived by the human ear. This would appear to seriously limit the usefulness of the WPPT in so far as expressions of folklore are concerned. Work continues on the development of an instrument for the protection of audiovisual performances.

(iii) Collection, Recordal and Dissemination of Traditional Cultural Expressions – Copyright and Related Rights

Introduction

114. The Report on National Experiences (WIPO/GRTKF/IC/3/10) described the activities of many cultural heritage archives, libraries, museums and other such institutions from around the world. Their activities are important for the safeguarding, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. They may also make a valuable contribution to the legal protection of traditional cultural expressions, and possibilities in this regard need further exploration.

115. Yet, as noted in Part III, Indigenous peoples and traditional communities have expressed certain IP-related concerns with the collection, recordal, preservation and dissemination of their tangible and intangible cultural heritage by collectors and other fieldworkers (such as folklorists, ethnographers, ethnomusicologists and cultural anthropologists), researchers, museums, libraries, archives[67], collections[68] and other such institutions.

116. It seems necessary that the relationship between the activities of collectors and other fieldworkers, researchers, museums, archives and other collections, on the one hand, and the legal protection of traditional cultural expressions, on the other, merits further exploration. The ultimate goal should be to promote complementarity by establishing appropriate legal and structural linkages between the activities of fieldworkers and archives, and the national and regional systems for the legal protection of traditional cultural expressions.

An illustrative example

117. These questions touch primarily in this context upon copyright and related rights. For example, to take the case of a fieldworker who records the performance of a traditional song on audio tape with the consent of the performer, who for purposes of this example is a member of the cultural community from which the song originated.

---

[67] "Archives" refers to institution-based archives with collections of audio recordings, video recordings, photographs, paper records, and other materials related to systematic collections that often combine several media. See Seeger, A., "Intellectual Property and Audiovisual Archives and Collections," paper delivered at "Folk Heritage Collections in Crisis," conference organized by the American Folklore Society and the American Folklife Center at the Library of Congress, December 1-2, 2001.

[68] "Collections" are any kind of private collections that have not yet been deposited in a specialized institution such as an archive. These could be a researcher's field tapes, or a collector's record collection, for example.

(i) There are potentially four distinct IP rights that may be relevant - copyright in the musical work; copyright in the words sung as part of the song (the lyrics); related rights of the performer of the song; and, related rights in the field recording.

(ii) Assuming for now that the song and the words themselves are not copyright works (for one or more of the reasons discussed above in the section on literary and artistic productions), the performer of the song would have related "performer's rights" in his performance (under the WIPO Performances and Phonograms Treaty, 1996 (the WPPT), performances of 'expressions of folklore" are protected).

(iii) In addition, under IP law, the fieldworker (or the institution of which he is an employee) would be regarded as having related rights in the field recording, namely the rights of a sound recording producer, as it was he or she that made the fixation.

(iv) In some cases, the fieldworker may deposit the recording for preservation purposes in an archive, museum, library or other such institution, to which he may transfer his or her IP rights (or the employer may transfer its rights) in the recording, in a deposit or similar agreement.

(v) It is this physical recording of the song that is the most conveniently accessible by commercial and other users, and for this reason the rights in the recording assume a central importance. In the experience of many folklore archives and centers, the collector (fieldworker) is generally regarded as the custodian of the materials he or she collects, and not as having any rights in them. At least in the case of some public institutions, deposits of field recordings in an archive or other repository must be accompanied by release forms from the performers, the source community or other concerned tradition bearers. The donor of a collection has therefore the immediate responsibility as an intermediary between the source community or tradition bearers that he or she has collected from and the final repository of the collection.

(vi) On the other hand, under IP laws as pointed out, IP rights in the such recordings vest normally in either the fieldworker (or employer) or the institution holding the recording, not in the performer or the community whose song was performed. It is here – in the management of the rights in and of access to the field recording - that there may be opportunities for practical action to protect the rights and interests of the performer and perhaps indirectly also the community from which the song originated.

(vii) Museums, libraries and archives often make further copies of such recordings for preservation purposes (many national copyright laws allow the making of "archival copies"). They also facilitate public access to and use of their recordings and collections for teaching, research and commercial purposes, and in the case of publicly-funded institutions they may even be under a statutory duty to do so. It is at this point that there is an opportunity for the rights and interests of performers and relevant communities to be protected – for example, as is common practice at least in some countries among public archives and museums, it may be required that copies of recordings only be released upon evidence of the consent of the performers or of good faith efforts to find their heirs.

(viii) To return to the example, another musician may legitimately access the recording of the traditional song in the museum or archive, re-arrange or re-record it, or sample the

recording and create a new musical work. To the extent that he creates a new musical work, he would be entitled to copyright.

(ix) In so doing, the musician is in a sense ensuring the onward transmission of the cultural expression and perhaps even its survival in economic terms (the recording industry, as well as the broadcasting, film and tourism industries, become the "new patrons of oral traditions and folklore"[69]). It is not also bad policy to allow traditional creations to be used as a source of inspiration for the creation of new copyright works (see discussion above in section on literary and artistic productions and copyright law).

(x) However, despite this, the Indigenous or traditional community whose song was initially performed and the performer of the song whose performance was fixed, would probably be aggrieved not to receive any share of the commercial benefits and/of some form of acknowledgement. In the absence of any copyright in the song itself, what of the sound recording rights of the fieldworker (or institution) and the rights of the performer?

(xi) As for the first, the rights of a sound recording producer comprise *inter alia* the right to authorize the reproduction of the recording. This right may in principle be exercised in a way that takes into account the rights and interests of the original community and/or performer. The example provided by the delegation of the United States of America at the third Intergovernmental Committee session regarding the monies paid to the performers of archival music use in a recent film, shows that preservation activities are relevant to and can play a part in the sharing of commercial benefits.[70] The possibilities in this area for making this a more common practice could be explored.

(xii) As for the performer, his rights include the right of reproduction of his performance fixed in the field recording (Article 7, WPPT). His rights could be used to protect also the otherwise unprotected music and lyrics.

(xiii) But it is not clear to what extent the rights of performers are taken into account in these cases, and in any event, the performer may not have the means to exercise and enforce his rights. (It could be added here that for countries that have not yet ratified the WPPT, and depending on national laws, his performance may not be a protected performance if the relevant national law does not require the protection of performances of "expressions of folklore" other than those defined as literary and artistic works in the copyright sense. This is because the Rome Convention and the TRIPS Agreement only require the protection of performances of literary and artistic works. In addition, under the Rome Convention and the TRIPS Agreement, the performer's rights may not include the right to prevent the reproduction of the fixation of the performance because he had consented to the initial fixation (see the limitation of rights in Rome Convention, Article 7 (1) (c) (i), which is perhaps carried over to TRIPS, Article 14.1).

(xiv) It can be added here too that had the fixation been audiovisual, the performer's rights would be much more limited (in short because the TRIPS Agreement and the WPPT cover audio fixations only, and Article 19 of the Rome Convention provides that once a

---

69 Chaudhuri, S., "The Experience of Asia," paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002, page 34.

70 WIPO/GRTKF/IC/3/17, par. 271.

performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 of the Convention which sets out the performer's rights, shall have no further application)).

118. This is a simplistic example, but it illustrates that a number of IP questions may arise in connection with the collection, recordal, preservation and dissemination of traditional cultural expressions. The collection, recordal, preservation and dissemination may, viewed from the perspective of Indigenous peoples and traditional communities, carry certain IP-related dangers if the relevant IP issues are not successfully managed. While this example concerns music only, as Janke and others make clear, Indigenous peoples and traditional communities have similar concerns with other forms of cultural heritage collected and held in archives and museums, such as photographs, documents, research papers, and movable cultural properties.

Experiences of existing archives

119. The Report on National Experiences (WIPO/GRTKF/IC/3/10) described many cultural heritage collection and recordal initiatives, and many others are in train. Legal-technical cooperation activities of the WIPO Secretariat since the publication of the Report on National Experiences have disclosed many other such initiatives, an example of which is *La Banque de Données Ethnographiques du Laos*, containing 6000 digitized photographs of traditional dress, musical instruments, handicrafts and textiles. At the international level, there are also many collections and archives, such as the "UNESCO Collection of Traditional Music of the World."

120. It is not clear to what extent the IP implications of these activities, particularly for Indigenous peoples and traditional communities, have been considered or are taken into account. This seems necessary because, perhaps as the simple example above shows, collectors (fieldworkers) and archives lie at the junction between communities and the marketplace. They can therefore play a key mediatory role in protecting cultural expressions while also making it possible for people to use, re-use and re-create cultural heritage which is vital to its survival.

121. Academics, folklorists, ethnomusicologists and others have discussed this issue at length.[71] While it does not seem as if any of the policies, ethical codes and guidelines developed by folklorist, ethnographic and anthropological societies and other professional bodies deal with IP questions, there are now some examples of protocols and codes of conduct that may be relevant. An example would be the Australian National Association for the Visual Art's (NAVA) report *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector*. The report has raised public

---

[71] Seeger, A., *op. cit*., Chaudhuri, S., "The Experience of Asia," paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002; Peters, M., "Protection of the collection of expressions of folklore; the role of libraries and archives," paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002; Seeger, A., "Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property," 1996 Yearbook for Traditional Music, p. 87; Toelken, Barre "The Yellowman Tapes, 1996-1997," Journal of American Folklore 111 (442) 381-391, 1998.

awareness and encouraged discussion of Indigenous cultural and IP issues. The report details protocols for dealing with material created by Indigenous people and with material containing imagery, motifs or styles which are identifiably Indigenous. These codes are not legally enforceable, but they do establish industry standards that may, over time, be pointed to as a standard of conduct setting the course for legal rights.[72]

122. Certain archives and institutions address these questions in their day to day activities. For example, Chaudhuri reports on efforts at the Archives and Research Centre for Ethnomusicology, American Institute for Indian Studies in India, to protect the rights of performers by limiting the rights of the depositors of field recordings and by contacting the performers of deposited recordings to explain their rights.[73] The American Folklife Center, of the Library of Congress, follows a similar approach, viewing the collector/donor as well as the archive as being in a curatorial position only, and committed to fulfilling the wishes of the original performer of the tradition:

> "In other words, only the performer and his/her community or heirs are the rights-holders to the material; the collector/donor and the repository are curators, who are bound by the agreements reached among the parties. Where there are no written agreements, the researchers (sometimes with the help of the repository) must make a good faith effort to contact the original performer(s) to obtain written permission to re-use the material. This is especially in the case of where money may be made in a commercial recording. If that good faith effort fails, the researcher may still contact the collector/donor, who may have an opinion as the intermediary as to the wishes of the performer or the performer's community. Thus, there is a four-way dialogue among the performer, the collector/donor, the repository, and the researcher, where each has a role: The performer is the rights holder, the collector/donor is the intermediate curator, the repository is the final curator, and the researcher is the applicant for permission to use the material."[74]

123. The Center for Folklife and Cultural Heritage of the Smithsonian Institution in the United States of America has extensive archives and collections of original sound recordings, drawings, posters, business records, correspondence, audiovisual recordings and photographic material. As a part of the Center, Smithsonian Folkway Recordings holds extensive collections of American Indian, bluegrass, blues, children's, and classical music as well as other genres. It licenses its music collection for non-profit or commercial purposes and for this purpose has developed a "Master Recording License Request Form."[75] Seeger writes of efforts by Smithsonian Folkway Recordings to respect and protect the rights of both songwriters and performers.[76]

---

72 See Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, page 139.

73 Chaudhuri, op. cit., page 36.

74 Personal communication with Ms. Peggy Bulger, Director and Mr. Michael Taft, Folklife Specialist, American Folklife Center, October 15, 2002.

75 See http://www.folkways.si.edu/licenserequests.htm

76 Seeger, A., "Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property," 1996 Yearbook for Traditional Music, p. 87.

Suggestions for further exploration and action

124. Collection, preservation and recordal activities can play a valuable role in complementing legal protection initiatives. Indigenous peoples and traditional communities, as well as archivists, collectors, folklorists, ethnographers and anthropologists, have expressed a need for advice, training and information on the various IP issues that arise in connection with the collection, recordal, documentation and public dissemination of expressions of folklore.

125. Some specific suggestions in this regard, gleaned from previous WIPO and other activities (such as the WIPO fact-finding missions and the Folk Heritage in Crisis Conference, organized by the American Folklore Society and the American Folklife Centre at the Library of Congress in December 2000), [77] could be for:

(i) the provision of practical IP advice and information to ethnographic and folklorist archives, institutions and societies for use in their development of *policies, ethical guidelines and codes of conduct*;

(ii) the development of an IP *check list* and *model IP contractual clauses* for use in elaborating deposit, access, release and license agreements used by ethnomusicologists and other fieldworkers, archives, museums, libraries and other institutions;

(iii) publication of a *practical guide* for use by communities as well as ethnomusicologists and other fieldworkers, archives, museums, institutions and societies; and,

(iv) the provision of *practical advice, information and training* to Indigenous peoples and local communities engaged in documentation initiatives on the *IP* aspects and implications of their work;

(v) ultimately, establishing *structural and legal linkages* between researchers, archives and such institutions and national and regional systems for the legal protection of traditional cultural expressions.

126. Certain of these needs (such as those in (i), (iv) and (v)) can be explored further as part of the legal-technical cooperation program being undertaken by the WIPO Secretariat. These issues will be addressed in the "WIPO Practical Guide for the Legal Protection of Traditional Cultural Expression." In this way, the need in (iii) could be addressed. In undertaking this work, the Secretariat proposes to seek the input of relevant associations, societies and institutions, as well as relevant NGOs such as the institutions mentioned in the Report on National Experiences (WIPO/GRTKF/IC/3/10) and others such as the Gulf Cooperation Council (GCC) Folklore Centre, the International Council of Music (ICOM), the International

---

[77] See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001). This need was explicitly referred to for example during the missions to South Asia and the Arab Countries (see pages 111 and 168). See also Concluding Discussion and Recommendations, Folk Heritage in Crisis Conference, December 1 to 2, 2000.

Association of Sound and Audio Visual Archives (IASA) and the International Council of Traditional Music (ICTM). In addition, the "IP Management Toolkit for Traditional Knowledge Documentation,"[78] which will deal with the patent and other industrial property implications of documenting technical traditional knowledge, will complement this publication.

127. In so far as the need in (ii) is concerned, Member States may wish to consider whether or not the Intergovernmental Committee should embark upon activities meeting this need, such as the collection of existing IP-related clauses in deposit, access, release and license agreements, and thereafter the development of model contractual clauses.

The legal protection of collections, anthologies and databases

128. While the collection and recordal of traditional cultural expressions may carry certain IP-related dangers for the legal protection of the expressions, IP rights attaching now or in the future to collections, anthologies and databases may offer a form of positive protection for the expressions.

129. There are already many electronic databases of traditional cultural expressions throughout the world, such as a CD-ROM containing "Folk Performances of Thailand," published by the Office of the National Culture Commission of Thailand; the Lao database referred to earlier; and the "Cultural Stories" database being developed by the Tulalip Tribes of the United States of America. It is not however clear to what extent copyright and related rights issues may be relevant or have been considered in their development and dissemination.

130. It is often suggested that expressions of folklore may be protected indirectly either by copyright protection afforded to databases that are "original" by reason of the selection or arrangement of their contents, or by proposed *sui generis* protection for non-original databases. This is further explained in the Report on National Experiences (WIPO/GRTKF/IC/3/10), paragraphs 52 to 56.

131. Database protection under copyright does not protect the contents of the database and is without prejudice to any rights subsisting in the contents. Therefore, the protection in question would not apply to the expressions of folklore in the database, but only to their publication and presentation in the form of a collection, anthology or compilation. There would be nothing, therefore, to prevent a non-Indigenous person from extracting one of the songs making up a collection of traditional music and reproducing, adapting and commercializing that song, assuming for the present that no other rights attach to the song. This is apparently what happened in some of the music examples cited in Part II above.

132. However, the prospect of *sui generis* database protection may have application in this area. A European Community directive and certain national laws now provide for protection of non-original databases. As an example, the European Community directive provides, for the makers of databases, which represent a substantial investment in either the obtaining, verification or presentation of the contents, the rights to prevent the extraction and/or re-utilization of the whole or of a substantial part of the database's contents. This protection

[78] See the draft outline in document WIPO/GRTKF/IC/4/5.

applies irrespective of the eligibility of the contents for protection by copyright or by other rights.

133. Therefore, from the perspective of Indigenous peoples and traditional communities, it is possible that collections and databases of expressions of folklore made by the relevant communities, whether or not the individual expressions are regarded as "literary and artistic works," could be protected under proposals for *sui generis* database protection. However, whether this protection could, in principle, extend to individual expressions being extracted and re-utilized is doubtful.

134. However, in cases where the collection or other form of database is made by a person or persons other than the Indigenous or traditional persons or community that is the source of the expressions of folklore, it is that other person or persons who would own the rights in the database. In order for the relevant Indigenous peoples and traditional communities to hold the rights in such databases, they must be regarded as the creators or makers of the databases, or at least acquire the rights from the creators and makers.

135. The use of databases to legally protect traditional cultural expressions will continue to be analyzed by the WIPO Secretariat and will be addressed in its legal technical cooperation program as well as in the "WIPO Practical Guide on the Legal Protection of Traditional Cultural Expressions." As advised in the Report on National Experiences, the WIPO Standing Committee on Copyright and Related Rights is continuing to examine the protection of non-original databases, and developments will be closely followed.

(iv) Distinctive Signs – Law of Trademarks and Geographical Indications

Introduction

136. Trademarks are signs used to distinguish the trade of one business from that of another in the marketplace. Such signs may consist of, among others, words, drawings, symbols, devices and shapes of products. Indigenous peoples and traditional communities are concerned with non-Indigenous companies and persons using their words, names, designs, symbols, and other distinctive signs in the course of trade, and registering them as trademarks. As shown in Part II, there are several publicized examples of the unauthorized use of Indigenous and traditional words, names, designs, symbols and other distinctive signs and of their registration as trademarks. At the same time, they argue that they themselves cannot protect their words and symbols using existing trademark laws as they are not sufficiently adapted to their needs.

Registration by third parties of Indigenous words, names and marks as trademarks

137. It has been suggested that the main reason for the appropriation of Indigenous and traditional words and other marks is for marketing "indigeneity" for commercial gain.[79] But, as trademarks serve to indicate the origin of products and to distinguish one product from

[79] Sandler, F. "Music of the Village in the Global Marketplace: Self-Expression, Inspiration, Appropriation, or Exploitation?" p. 39.

another, the unauthorized use of distinctive Indigenous words and symbols by non-Indigenous entities could potentially cause confusion in the minds of consumers as to the true origin of the products concerned. Use of Indigenous signs as trademarks may give consumers the impression that such products are genuinely Indigenous-made or have certain traits and qualities that are inherent to the Indigenous cultures when they do not. Through use by others of their symbols, words and so on as trademarks, Indigenous peoples and traditional communities become associated with products that may be inferior, stereotyped or associated with a certain lifestyle.[80]

138. Aside from trademark considerations, of course unfair competition law (including passing off) and the laws of misleading and false advertising and labeling are also relevant here. The Indian Arts and Crafts Act, 1990 (the IACA) protects Native American artisans by assuring them the authenticity of Indian artifacts under the authority of an Indian Arts and Crafts Board. The IACA, a "truth-in-marketing" law, prevents the marketing of products as "Indian made" when the products are not made by Indians as they are defined by the Act.[81] See further WIPO/GRTKF/IC/3/10, par. 122). The law of unfair competition is dealt with separately in this document.

Measures to prevent the registration of Indigenous words, names and other marks as trademarks

139. Certain States have already taken steps to prevent as far as possible the unauthorized registration of Indigenous marks as trademarks. Two examples are the United States of America and New Zealand, which are following different approaches to deal with these issues:

(i) The United States Patent and Trademark Office (the USPTO) has established a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes.[82] This is reported on in the WIPO Report on National Experiences (WIPO/GRTKF/IC/3/10, at paragraph 122 (ii)).

(ii) As also reported in WIPO/GRTKF/IC/3/10, at paragraph 127, in New Zealand, a new Trade Marks Bill is being considered by Parliament which contains a provision which would allow the Commissioner of Trade Marks to refuse to register a trademark if it is considered by the Commissioner that, on reasonable grounds, the use or registration is likely to offend a significant section of the community, including the Indigenous people of that country, Maori. Under the section which lists grounds for not registering trademarks the draft bill states:

> *"(1) The Commissioner must not do any of the following things:*
>
> *(b) register a trademark or part of a trade mark if –*

---

80 Cassidy, Michael (ed.) "Intellectual Property and Aboriginal People: A Working Paper," p.22.

81 WIPO/GRTKF/IC/3/10, par. 122 (i).

82 See "Report on the Official Insignia of Native American Tribes," September 30, 1999.

(i) the Commissioner considers that on, reasonable grounds, its use or registration would be likely to offend a significant section of the community, including Maori:" [83]

Opposition and expungement procedures

140. If an Indigenous or traditional word or other mark has been registered as a trademark by a person or entity not authorized by the relevant community to do so, the relevant community could launch expungement proceedings (or the community could oppose a mark for which application is sought). The grounds for doing so would include, for example, that the proposed mark lacks distinctiveness, that the registration of the mark is or would be "contrary to law" or "scandalous," or that the proposed mark is deceptive and confusing as to the applicant's good and services. Trademark law also allows for relative grounds of opposition on the basis of third party rights, such as prior rights held by a community in the sign to the extent that the sign denotes the community's identity or origin.

141. However, on the basis of available reports, it seems that there are very few cases in which Indigenous peoples or communities have opposed the registration of a mark or applied to expunge a registered mark. Janke, in her study for WIPO on "The Use of Trademarks to Protect Traditional Cultural Expressions,"[84] states that Indigenous peoples have limited access to legal advice and the relevant official gazettes and journals in which trademark applications are notified. She suggests that information and training be provided to Indigenous peoples on how opposition and expungement proceedings work.[85]

Registration of trademarks by Indigenous peoples and traditional communities

142. In their responses to the WIPO folklore questionnaire of 2001, States gave several examples of uses of the trademark by Indigenous peoples and traditional communities. These are reported on in the Report on National Experiences (WIPO/GRTKF/IC/3/10) and include the Indigenous Label of Authenticity in Australia[86], and the use of trademarks by the Aboriginal People of Canada.

143. More recently, the WIPO Secretariat has also received further information on developments in New Zealand where the Maori Arts Board, *Te Waka Toi*, is making use of trademark protection through the development of the *Toi Iho* ™ Maori Made Mark.[87] The mark is a trademark of authenticity and quality, which indicates to consumers that the creator of goods is of Maori descent and produces work of a particular quality.[88] The *Toi Iho* Maori Made Mark is a registered trademark created in response to concerns raised by Maori regarding the protection of cultural and IP rights, the misuse and abuse of Maori concepts,

---

83 See Draft Trade Marks Bill of New Zealand.

84 At http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html

85 Pages 9 and 10.

86 As part of the *Minding Culture* case studies by Terri Janke, the case study "Indigenous Arts Certification Mark" will be published shortly on <http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>

87 For more information on the *Toi Iho* ™ Mark see <http://www.toiiho.com>

88 See Rule 5.3 in "Rules Governing the Use By Artists of the *Toi Iho* ™ Maori Made Mark" published by the Arts Council of New Zealand Toi Aotearoa.

styles and imagery and the lack of commercial benefits accruing back to Maori. The mark is regarded by many as an interim means of providing limited protection to Maori cultural property. The mechanism will not prevent the actual misuse of Maori concepts, styles and imagery but may decrease the market for "copy cat" products. [89] The *Toi Iho* Maori Made Mark was designed and created by Maori artists and has two companion marks namely, the Mainly Maori Mark and the Maori Co-production mark. The *Toi Iho* Mainly Maori Mark is for groups of artists, most of Maori descent, who work together to produce, present or perform works across art forms whereas the *Toi Iho* Maori Co-production mark is for Maori artists who create works with persons not of Maori descent to produce, present or perform works across art forms. The *Toi Iho* Maori Co-production mark acknowledges the growth of innovation and collaborative ventures between Maori and non-Maori.[90]

144. Indigenous and traditional peoples have raised concerns that the trademark system does not meet their needs for the reasons outlined in Section III. For example, trademarks are marks used in the course of trade. For Indigenous peoples and traditional communities to register an Indigenous word or mark as a trademark they are required to use the trademark in the course of trade or have the genuine intention to do so. This does not assist traditional cultural communities who wish only to protect their words and other marks against exploitation by others. However, the rights of a community to its own name and identity may be useful and could be explored further.

145. Yet Janke[91] identifies many cases in which Indigenous Australians have attempted to register or have registered Indigenous words and designs as trademarks, as well as English words that have a particular meaning or significance for Indigenous Australians. An example of the latter is the word "dreaming," for which some 90 applications have been lodged. 15 have been registered and nine are pending.

146. Janke reports that trademarks have been registered or at least applied for by Indigenous Australians in respect of cultural festivals, soaps, perfumery, essential oils, body lotions and other natural resource products, arts centres, clothing and textiles, music, film and broadcasting and publications and Internet-related services.

147. However, many such applications do not proceed to registration. Janke concludes as follows:

> "There has been an increase in the number of Indigenous businesses and organizations attempting to make use of trade mark laws in an effort to register their own trade marks for the protection of their artistic works and other Indigenous knowledge, particularly proposed Indigenous commercial use. In most cases, the trade marks have not proceeded to registration. It is hypothesized that this is because often the proposed trade mark consists entirely of words that are purely descriptive . . . on receipt of an adverse report, the Indigenous application often does not reply to clarify the application. . . The number of unregistered trade marks used by Aboriginal businesses and organizations is considerably greater than those that are registered. . . Although, there is strong evidence that Indigenous use of the trade marks system is increasing, it would

---

89 See response to Folklore Questionnaire by New Zealand.

90 <http://www.toiiho.com/about/about.htm>

91 At http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html

appear that Indigenous people need to know much more about the system, namely how to apply and overcome descriptiveness of marks and other issues raised in adverse reports. . . ."[92]

Geographical indications

148. Geographical indications are potentially useful in this area as a number of participants in the Committee's work have pointed out. No specific examples are yet apparent illustrating the use of geographical indications to protect expressions of traditional culture or folklore directly, although their possible use for the protection of handicrafts and similar materials has been extensively discussed. Further versions of this document will explore this issue further, based on additional research in this area.

Conclusions

149. At this stage, it may be perceived that laws protecting distinctive signs, in particular marks and geographical indications, offer opportunities for the protection of Indigenous and traditional marks that are intended to be used in the course of trade as with any other signs. The potentially permanent duration of trademark protection and the use of collective and certification marks are particularly advantageous as has been explained.

150. States are also establishing mechanisms to prevent the registration by third parties of Indigenous and traditional marks and symbols as trademarks, and are moving towards meeting the need for "defensive" protection.

151. However, practical obstacles remain, such as the application and renewal fees, and a general lack of awareness of the law and its possibilities among Indigenous and traditional communities, especially as regards opposition and invalidation proceedings.

(v) Traditional Designs – Industrial Designs Law

152. Industrial design law protects the external appearance of independently created functional items that are new or original.[93] Design rights can be based on creation or on registration, and confer exclusive rights to the registered owner of the design. Design rights remain in force for at least ten years, and longer in some jurisdictions.[94] The owner of a protected design has the right to prevent third parties from reproducing, selling or importing articles which embody the same or similar design to that of the protected design.[95]

153. There are several examples of traditional cultural expressions (as noted in Section II) that appear relevant to industrial design protection, such as textiles (fabrics, costumes, garments, carpets and so on) and other tangible expressions of culture, such as carvings, sculptures, pottery, woodwork, metalware, jewelry, basket weaving and other forms of handicraft.

---

92 Page 22.
93 Article 25.1 of TRIPS Agreement of 1994.
94 Article 26.3 of TRIPS Agreement of 1994.
95 Article 26.1 of TRIPS Agreement of 1994.

154. As shown by the fact-finding and subsequent activities of WIPO, Indigenous peoples and traditional communities claim that under current designs law they are unable to protect their designs as industrial designs, even though design protection appears well suited to protecting the design, shape and visual characteristics of craft products especially where the "crafts products are of utilitarian nature and cannot be considered works of art and therefore eligible for copyright protection ..."[96] In addition, they argue that third parties exploit their designs without authority, acknowledgement or benefit-sharing, and, in some cases, even obtain IP rights over their 'new' or 'original' designs. One of the claims most frequently heard is that the 'style' of an Indigenous design has been misappropriated.

155. In this section, these claims, essentially for positive protection as well as for defensive protection, will be examined.

Positive protection of traditional designs

156. For a design to be protected as an industrial design it needs to be "new or original."[97] Although there is no established definition of the notion "new" in international treaties, it generally means that no identical or very similar design is known to have existed before.[98] The TRIPS Agreement specifies that "Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features."[99]

157. It would seem that some traditional designs would not meet this requirement. However, there are examples of where traditional designs have been registered under industrial design laws. In Kazakhstan, industrial design protection has been granted to the outward appearance of national outer clothes, head dresses (*sakyele*), carpets (*tuskiiz*), decorations of saddles, and women's decorations in form of bracelets (*blezik*).[100] Industrial design protection is found in that country's patent law,[101] which defines an industrial design as "*an artistic and technical solution defining the outward appearance of a manufactured article*."[102] The law states additionally that for an industrial design to be protectible, it has to be new, original and deemed industrially applicable.[103] It is also interesting to note the description of 'new' provided in the law: "an industrial design shall be deemed new if the sum of its essential features appearing on the photographs of the design and in the description of its essential features, was not known from information generally available in the world before the priority date of the design."[104]

---

96 See Document submitted by GRULAC "Traditional Knowledge and the Need to Give it Adequate Intellectual Property Protection" (WIPO/GRTKF/IC/1/5), Annex I, par. 6.

97 Article 25.1 of TRIPS Agreement of 1994.

98 See <http://www.wipo.int/about-ip/en/index.html?wipo_content_frame=/about-ip/en/industrial_designs.html>

99 Article 25.1 of TRIPS Agreement of 1994.

100 See Report on National Experiences (WIPO/GRTKF/IC/3/10), par. 126.

101 See Patent Law of the Republic of Kazakhstan, No.428-I LRK, July 16, 1999, available at <http://www.kazpatent.org/english/acts/patent_law.html>

102 Article 8 (1) of Patent Law of Kazakhstan.

103 Ibid.

104 Ibid.

158. Further such examples may be needed before being able to draw any conclusions. However, it is suggested, in line with similar arguments made in the section on "Literary and artistic productions – copyright," that while contemporary forms of traditional designs may meet the "newness" requirement, recreations of designs already exploited and well known would probably not.

The designs registration procedure and its implications for Indigenous peoples and traditional communities

159. Indigenous peoples and traditional communities reportedly find the following shortcomings in design protection under industrial design laws:

(i) a registered design is disclosed to the public, and in the case particularly of sacred or secret designs this does not meet Indigenous and traditional peoples' needs. However, it could be pointed out that sacred and secret designs need not be registered in order to receive protection – they could be protected as undisclosed information; and, secondly, a design that is not secret or sacred and is being used by a community, has been disclosed anyway, and registration simply provides the necessary protection;

(ii) the period of protection is limited, and the design then falls into the public domain. Indigenous peoples and traditional communities wish to protect their traditional designs against exploitation by non-Indigenous persons indefinitely, particularly, again, in the case of designs of special cultural and spiritual significance where protecting their integrity may be of greater importance than exploiting their commercial value. In such cases, perhaps, it may be preferable to protect certain designs under copyright law as artistic expressions rather than as industrial designs where the term of protection is more limited than as under copyright laws;

(iii) communities encounter difficulties in protecting their collective rights. Although industrial design laws can be registered in the name of two or more persons, each with equal undivided shares in the registered design, collective rights can only be given if the body applying for protection of industrial design has legal capacity (which most communities would probably have);

(iv) the costs involved in registering an industrial design and subsequently enforcing it if the need arises.

Facilitating use of industrial design law

160. Various proposals have been made to modify industrial design law and practice to make it easier for Indigenous peoples and traditional communities to take advantage of industrial designs protection.

161. In this regard, the TRIPS Agreement requires States to "ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such

protection."[105] This provision clearly indicates that no person should be prevented from registering their textiles designs due to cost implications involved in the registration process.

162. A practical suggestion is that it may be important for traditional knowledge documentation initiatives to structure their documentation work in such a way as to fulfill the minimum documentation requirements for the acquisition, exercise and enforcement of design rights. This could entail, for example, the harmonization of existing industrial property classification and documentation standards (such as the Locarno Agreement Establishing an International Classification for Industrial Designs, 1979 and Standard ST.80 (Recommendation Concerning Bibliographic Data Relating to Industrial Designs (Identification and Minimum Requirements)[106], and tradition-based design documentation standards (such as the UNESCO methodological guide to the collection of data on crafts).

163. However, the practical usefulness of such work should be evaluated. Such an exercise also raises practical and legal questions. These issues will be considered and studied further and in due course addressed in WIPO's legal –technical assistance program and in the "WIPO Practical Guide on the Legal Protection of Traditional Cultural Expressions."

Defensive protection

164. As noted in Section II, it is often the appropriation of the "style" of traditional designs that is complained of. This question is also discussed in the section above on "Literary and artistic productions – copyright," and the points made there are relevant too to designs.

165. Another way in which expressions of folklore can be protected defensively could be through the process of documentation. The fact-finding missions suggested "three steps for an improved protection of traditional knowledge-based designs under the existing industrial design system: (1) standards for the documentation of tradition-based design should take into account the minimum documentation requirements for industrial designs under the TRIPS Agreement and the Hague Agreement Concerning the International Deposit of Industrial Designs; (2) the industrial property offices should incorporate standardized documentation of traditional designs into their search files for examination of the substantive examination of applications for industrial design titles; (3) relevant classes or subclasses for TK-based designs should be established under the Locarno Agreement Establishing an International Classification for Industrial Designs (1979)."[107] The inclusion of the lists of cultural expressions and including them into an international design registry such as the Hague Agreement could help examiners identify cultural expressions belonging to traditional

---

105 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994, Section 4, Article 25 (2).

106 This is one of the 50 WIPO Standards, Recommendations and Guidelines related to industrial property information and documentation. They aim to harmonize practices by all industrial property offices and to facilitate the international transmission, exchange and dissemination of industrial property information (for both text and images).

107 "Intellectual Property Needs and Expectations of Traditional Knowledge Holders" WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), p. 110

communities and refusing any applications for the registration thereof on the legal basis that they are not new and original, and the applicant is not the creator of the design.

166. This suggestion mirrors the work being undertaken in relation to "technical" traditional knowledge and patents aimed at the defensive publication of traditional knowledge so as to prevent the acquisition of patent rights over traditional knowledge-based inventions. Accordingly, the integration of information about cultural expressions would aim at enabling documentation initiatives to make public domain tradition-based designs data available to IP offices, and allowing them to integrate such data into their existing procedures for the filing, examination, granting and publication of IP titles.

167. However, it is not clear to what extent such activities for the "defensive publication" of industrial design information would meet real needs. The acquisition of industrial design rights over handicrafts and other tangible expressions of folklore already in the public domain does perhaps not seem as prevalent as is the case in other areas, such as patents. In addition, as more countries – including developed countries - appear to be moving away from substantive examinations of industrial design applications (particularly novelty searches), extensive activities in relation to the integration of cultural expressions information into searchable prior art for industrial design purposes may not serve practically useful purposes.

Sui generis protection of designs

168. It can be noted that existing *sui generis* systems cover also traditional designs, and they will be discussed more fully in future versions of this document. In brief:

(i) the Model Provisions, 1982 provide for the protection of designs as tangible expressions of folklore[108] against their unauthorized reproduction or use;

(ii) Panama's *sui generis* law, "Special Intellectual Property Regime on Collective Rights if Indigenous Peoples for the Protection and Defense of their Cultural Identity as their Traditional Knowledge,"[109] makes explicit reference to traditional textile and dress designs. Also relevant would be the "Provisions on the Protection, Promotion and Development of Handicraft."[110] Chapter VIII of this Law establishes protection for national handicrafts by prohibiting the import of craft products or the activities of those who imitate Indigenous and traditional Panamanian articles and clothing.[111]

---

108 See Section 2 of the Model Provisions

109 Established by Law No. 20, of June 26, 2000 and regulated by Executive Decree No. 12, of March 20, 2001. See also Final Report on National Experiences (WIPO/GRTKF/IC/3/10), para.121 (ii).

110 Panama Law No. 27 of July 24, 1997.

111 See response of Panama to Folklore Questionnaire at <http://www.wipo.org/globalissues/questionnaires/ic-2-7/panama.pdf>

Conclusions

169. The requirement of "new" or "originality" can present difficulties for those traditional designs already commercialized and/or disclosed to the public. However, there are national experiences which show that traditional designs can be registered under industrial design laws. It would seem, however, that contemporary designs made by current generations of society could more easily meet the "new" or "original" requirement than would truly old and well-known designs. Further empirical information would be helpful.

170. Aside from this and other more technical questions, there are other conceptual and practical disadvantages to the industrial design system from the viewpoint of Indigenous peoples and traditional communities.

171. In respect of the conceptual issues (such as limited time period and collective rights protection), *sui generis* mechanisms have been established in some cases, and further experience is needed with them. Regarding the more practical questions (such as costs of acquisition and enforcement of rights), States could if they so wished address these in various ways – see further Part V below.

(vi) Unfair Competition (including passing off)

172. Protection under unfair competition law, or adapted forms of protection based on the framework of such law, may be useful in a number of cases relating to traditional cultural expressions. This was identified by the GRULAC Group in WO/GA/26/9 and by the Delegation of Norway at the third session of the Intergovernmental Committee, which referred to Article 10*bis* of the Paris Convention, requiring the suppression of unfair competition.

173. There is as yet little empirical information on the use of unfair competition as a means to protect traditional cultural expressions, yet this is an area that requires further consideration. Particularly the common-law remedy for "passing off" would seem particularly apposite in cases where commercial advantage is taken of an existing reputation (as pointed out above in the section on "Distinctive signs – trademarks and geographical indications"). A difficulty may be that unfair competition rules are varied at the national level, are developed nationally often through case law, and generally require the proof of damage to a commercial reputation. Future versions of this document will address this question further.

V. ACQUISITION, MANAGEMENT AND ENFORCEMENT OF RIGHTS

174. As recorded in the Report on National Experiences (WIPO/GRTKF/IC/3/10), while a number of countries provide specific legal protection for expressions of folklore (23, or 36%, of the 64 that responded to the Questionnaire), it appears that there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice.

175. In addition, as was noted too, use of existing IPRs where relevant appears limited to a few countries only.

176. The Report therefore concluded that there is a strong need for the strengthening and more effective implementation, at the national level, of existing systems and measures for the protection of expressions of folklore, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries. Comprehensive and integrated legal-technical assistance would be needed, utilizing, where appropriate, the full breadth of the IP system and other existing and available measures, and taking into account States' respective international IP obligations. The affected peoples and communities, and other stakeholders, such as the local legal profession, should also be consulted and involved where appropriate. The Report went on to propose enhanced legal-technical assistance by the WIPO Secretariat. This was approved at the third session as pointed out in the Introduction to this document.

177. Certain specific suggestions for improving use of existing rights and for strengthening the effective implementation of specific systems were recorded in the Report on National Experiences.

178. They include:

(i) awareness-raising programs and specialized training for Indigenous peoples and local communities in accessing, understanding and using formal IP systems and other legal tools available to them;

(ii) public information activities aimed specifically at indigenous peoples and local communities, and other activities carried out by national IP offices and other agencies designed to explain IP rules and systems clearly, and to facilitate access to the national IP offices and the IP system;

(iii) the possible reduction of filing and renewal fees for Indigenous peoples and traditional communities;

(iv) the establishment and strengthening of the institutional structures necessary to implement legislative provisions and other measures;

(v) where possible, making use of existing or new collective management societies;

(vi) national consultations among producers of handicrafts and other expression of folklore; [112]

(vii) the establishment of national focal points;[113]

(viii) the establishment of legal and structural linkages between systems for the legal protection of traditional cultural expressions and researchers and archives; and,

(ix) the use of alternative dispute resolution (ADR).

---

112 Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), p.4.

113 Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), p.4.

179. These naturally form part of the legal-technical cooperation program offered upon request by the WIPO Secretariat, and will also be addressed in the "WIPO Practical Guide on the Legal Protection of Traditional Cultural Expressions."

VI. CONCLUSIONS

180. This section draws some brief, tentative conclusions, with the aim of promoting further debate and discussion of the policy issues and practical legal options.

181. In so far as literary and artistic productions are concerned:

(i) Copyright protection is available for tangible contemporary traditional cultural expressions, and also for intangible contemporary expressions in jurisdictions not requiring fixation. However, the limited term of protection and certain other features of copyright (such as that it does not protect style or method of manufacture) makes copyright protection less attractive to Indigenous peoples and traditional communities and individuals. In addition, divergences between the rights of a copyright holder and parallel customary responsibilities can cause difficulties for Indigenous creators. Therefore, while copyright protection is possible in certain cases, it may not meet all the needs and objectives of Indigenous peoples and traditional communities.

(ii) For those States that do not wish to provide further protection for traditional cultural expressions beyond that already provided by copyright, further efforts could be directed towards enabling and facilitating access to and use of the copyright system by Indigenous peoples and traditional communities, as discussed in Part V.

(iii) Pre-existing traditional cultural expressions, and mere imitations and recreations of them, are unlikely to meet the originality and identifiable author requirements. They remain for copyright purposes in the public domain.

(iv) States which wish to provide fuller protection for traditional cultural expressions beyond current copyright could either consider whether certain amendments to copyright law and practice are necessary and justified, and/or they may consider establishing *sui generis* systems, as some have already done. While it may be possible to improve upon the protection already provided by copyright to contemporary tradition-based cultural expressions by means of amendments to copyright law and practice, it seems that a more thorough evolution of existing standards in the form of a *sui generis* system may be necessary in order to protect pre-existing folklore. Specific systems could seek to build upon existing institutional processes and structures, such as existing collective management societies and existing cultural heritage archives.

182. With regard to performances of traditional cultural expressions, the WPPT now makes it clear that performances of "expressions of folklore" are also protected. Use of performers' rights can indirectly protect the performed cultural expression itself. However, the TRIPS Agreement, 1994 and the WPPT, 1996 do not extend to the visual aspects of performances. The extension of performers' rights to the audiovisual sphere would significantly strengthen the protection of traditional cultural expressions.

183. Further exploration is needed on the relationship between the activities of researchers and archives, on the one hand, and the legal protection of traditional cultural expressions on the other. The ultimate goal should be to promote complementarity by establishing appropriate legal and structural linkages between the activities of fieldworkers and archives, and the national and regional systems for the legal protection of traditional cultural expressions. The legal-technical cooperation program offered by the WIPO Secretariat will include working closely with existing cultural heritage archives and institutions in this regard.

184. In so far as distinctive Indigenous or traditional signs are concerned, States are already experimenting with certain specific mechanisms to prevent their unauthorized or inappropriate registration as trademarks. Positive use is also being made of the trademark system by Indigenous peoples to guarantee the authenticity of their arts and crafts. The kind of practical measures discussed above in Part V and which concern easing use of the IP system apply here too.

185. Regarding traditional designs:

(i) The requirement of "newness" or "originality" can present difficulties for those traditional designs already commercialized and/or disclosed to the public. However, there are national experiences which show that traditional designs can be registered under industrial design laws. It would seem, however, that contemporary designs made by current generations of society could more easily meet the "new" or "original" requirement than would truly old and well-known designs. Further empirical information would be helpful.

(ii) Aside from this and other more technical questions, there are other conceptual and practical disadvantages to the industrial design system from the viewpoint of Indigenous peoples and traditional communities.

(iii) In respect of the conceptual issues (such as limited time period and collective rights protection), *sui generis* mechanisms have been established in some cases, and further experience is needed with them. Regarding the more practical questions (such as costs of acquisition and enforcement of rights), States could if they so wishes address these in various way – see further Part V above.

186. Future versions of this document could address more thoroughly, and depending also on the availability of further empirical information and national experiences, unfair competition, patents, unjust enrichment and other relevant common law remedies.

187. Members of the Committee are invited to review this document at the fourth session of the Committee, and to provide written comments before March 31, 2003, after which a further version of this document will be prepared for the fifth session of the Committee in 2003.

[End of document]