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INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

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**CONSOLIDATED ANALYSIS OF THE LEGAL PROTECTION OF TRADITIONAL
CULTURAL EXPRESSIONS**

Document prepared by the Secretariat

I. OVERVIEW

1. This document introduces a consolidated analysis of the legal protection of traditional cultural expressions (TCEs) (synonymous with 'expressions of folklore'), comprising an updated and extended version of the "Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore" (WIPO/GRTKF/IC/4/3) prepared by the WIPO Secretariat. It reviews the policy framework for protection of TCEs, and surveys the available forms of intellectual property (IP) protection for TCEs, through conventional or general IP regimes (including copyright, but also a range of other forms of IP), through adapted and extended IP regimes (such as adaptations of copyright to improve recognition of TCEs), and through new *sui generis* systems or laws especially created to give IP protection to TCEs.

2. This covering document gives an overview of the consolidated analysis and outlines its main points. The full text of the analysis is provided as an Annex to this document. The analysis should be read with reference to a complementary information resource, the "Comparative Summary of *Sui Generis* Laws for the Protection of Traditional Cultural Expressions" (WIPO/GRTKF/IC/5/INF/3), which sets out and contrasts the main elements of several key instruments concerning *sui generis* TCE protection. This analysis may contribute to continuing work and policy discussions on the legal protection of TCEs in several ways: it documents and contrasts practical experience with a wider range of legal mechanisms used to protect TCEs; and it may serve as a structured empirical resource for international discussions of possible future recommendations or guidelines to assist policymakers in the development of IP systems to protect TCEs.

3. It is suggested that this analysis could remain open for further input, so that Committee Members can continue to provide new and updated information about current forms of IP protection for TCEs, either through existing IP regimes, adapted IP regimes, or through new *sui generis* systems. The present document concludes with a suggested framework for considering the policy options for the protection of TCEs.

II. INTRODUCTION

4. At its fourth session in December 2002, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') considered a "Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore" (WIPO/GRTKF/IC/4/3). It requested the WIPO Secretariat to prepare a 'consolidated analysis' as an updated version of this earlier analytic work.

5. In preparing this updated analysis, the Secretariat took account of comments on WIPO/GRTKF/IC/4/3 made during the Committee's fourth session, the material provided during the presentations on the legal protection of TCEs that took place during the same session, and further comments and observations on document WIPO/GRTKF/IC/4/3 received by the WIPO Secretariat since the fourth session and up to May 1, 2003, from Canada, the Philippines, the United States of America (the U.S.A.), the African Intellectual Property Organization (OAPI) and the European Community and its Member States.

6. The main developments over previous material considered by the Committee are: (i) an expanded section on relevant policies and policy options; (ii) a section on TCEs as economic

and cultural assets; (iii) a revised section on cultural heritage collections, databases and registers; and (iv) integration of information previously contained in the “Final Report on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/3/10). In addition, further information on national experiences, examples and legal analysis has been added to various parts of the document pursuant to information, comments and observations received from Committee members.

7. This analysis as further supplemented and developed could eventually form basis for the Practical Guide on the legal protection of TCEs, as approved by the Committee at its third session (see WIPO/GRTKF/IC/3/10, paragraph 155 and WIPO/GRTKF/IC/5/3 paragraph 294).

III. SUMMARY OF MAIN POINTS OF THE CONSOLIDATED ANALYSIS

The policy context

8. The consolidated analysis in the Annex sets the legal protection of TCEs in the context of cultural and intellectual property policies addressing issues such as: (i) the preservation and safeguarding of tangible and intangible cultural heritage; (ii) the promotion of cultural diversity; (iii) the respect for cultural rights; and (iv) the promotion of creativity and innovation – including that which is tradition-based – as ingredients of sustainable economic development. How IP, and, in particular, the IP protection of TCEs, interacts with these issues is the focus of the policy analysis.

Tradition as a source of creativity

9. While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework. As traditional artists and practitioners continually bring fresh perspectives and experiences to their work, tradition can be an important source of creativity and innovation. Cultural heritage and traditional cultures are therefore often a source of creativity for indigenous, local and other cultural communities. Cultural heritage is also a source of inspiration and creativity for the cultural industries.

Intellectual property and the meaning of “protection”

10. Most forms of IP, such as copyright, related rights, patents and industrial design, establish private property rights in creations and innovations in order to grant control over their commercial exploitation and to provide incentives for the further creation and dissemination of the products of human creativity. IP protection must be distinguished from the concepts of “preservation” and “safeguarding.” The goals of copyright protection, for example, are largely to promote further creativity, encourage public dissemination and enable the holder to control the commercial exploitation of the work. By contrast, preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of tangible or intangible cultural heritage in order to ensure its maintenance and viability.

11. Clarity on what is meant by “protection” is necessary because it appears that in some cases the needs and expectations of TCE bearers would be addressed more appropriately by measures for preservation and safeguarding rather than protection in the IP sense. Any program of recording and documenting the expression of traditional culture needs to clarify

both preservation and protection objectives, and balance these objectives in an appropriate way. Where concerns arise about protection against commercial misuse of TCEs, unfair competition law may also provide a practical response to the needs and expectations of traditional communities.

Cultural heritage and IP protection

12. The analysis in the Annex makes a distinction between (i) pre-existing, underlying cultural heritage and traditional culture, which may be referred to as traditional culture or folklore *stricto sensu* and (ii) contemporary literary and artistic productions created by current generations of society and based upon or derived from pre-existing cultural heritage and traditional culture.

13. While pre-existing traditional culture as such and particular expressions thereof are generally not protected by current copyright or industrial design laws, a contemporary literary and artistic production derived from or inspired by traditional culture that incorporates new elements or expression is a “new” work in respect of which there is generally a living and identifiable creator (or creators). Such a contemporary production may include a new interpretation, arrangement, adaptation or collection of public domain pre-existing cultural heritage and expressions, or even their “re-packaging” in the form of digital enhancement, colorization and the like. Contemporary, tradition-based expressions and representations of traditional cultures are generally protected by existing copyright and industrial design law for which they are sufficiently “original” or “new” as required.

14. The consolidated analysis examines in detail the applicability of existing IP systems to the protection of TCEs, with reference where possible to actual cases and practical experiences.

The “public domain”

15. The analysis in the Annex suggests that a clearer understanding of the role, contours and boundaries of the “public domain” is vital in the development of an appropriate policy framework for the IP protection of TCEs. Holders and custodians of TCEs question whether the public domain status of cultural heritage offers the greatest opportunities for creation and development. Yet others argue that the public domain character of cultural heritage is valuable as it allows the regeneration and revitalization of cultural heritage. The public domain status of cultural heritage is also tied to its role as a source of creativity and innovation. Neither members of a cultural community nor the cultural industries may be able to create and innovate based on cultural heritage if exclusive private property rights were to be established over it.

Needs and expectations of indigenous and local communities

16. The needs and expectations of indigenous and local communities are roughly identified in the analysis as comprising either “positive” or “defensive” IP strategies or combinations of the two. (The nature of IP protection, and the distinction between positive and defensive protection strategies is also discussed in document WIPO/GRTKF/IC/5/12, see paragraphs 20, 28, and 41 to 44). The Annex discusses to what extent IP protection is relevant to meeting these needs, pointing out that some of them are perhaps more concerned with preservation and safeguarding than IP protection. It also argued that unfair competition law and other consumer protection laws may be particularly relevant and valuable.

Key policy questions and conclusions

17. A key policy question is whether limiting IP protection to contemporary, tradition-based cultural expressions adequately meets the identified cultural and intellectual property policy objectives. Does it offer the greatest opportunities for creativity and economic development? Does it best serve cultural diversity and cultural preservation? Does it address the concerns of the custodians of traditional cultures?

18. These questions pivot on whether IP protections should be available for TCEs that are now in the public domain: in other words, those traditional cultural expressions which do not qualify for protection by copyright or other forms of IP. Two general approaches have been proposed in international debate, especially in the work of the Committee. While there is a tendency to characterize these as opposing viewpoints, they are not necessarily mutually exclusive, and a comprehensive solution may draw on both points of view.

No IP protection for public domain TCEs: adequate to use existing and adapted IP standards and special IP measures

19. Some participants in the Committee have argued that existing conventional IP rights are adequate for the protection of TCEs if their full potential is explored. There are many examples of traditional communities successfully protecting songs, graphic works and other literary and artistic works through copyright and performers' rights. The current balance of interests in the IP system means that members of cultural communities as well as others are free to create and innovate on the basis of their cultural traditions, and acquire and benefit from any IP that may subsist in the creations and innovations. This contributes to their economic development, as well as meeting certain objectives of cultural heritage and cultural exchange policies. IP protection provides incentives for the creation and dissemination of new intellectual creations. Some proponents of this view consider that some adaptation to existing rights and/or some special measures within the IP system may be necessary and desirable to meet specific needs – for instance, copyright protection for works that have not been fixed in material form (e.g. works that have been passed only in oral form) and special remedies for copyright infringement that is also culturally offensive.

Property rights over public domain TCEs – sui generis systems

20. On the other hand, many Committee participants, communities and other stakeholders call for the establishment of legal protection for pre-existing TCEs which are presently in the public domain. This situation arises in two general ways: TCEs that might once have been eligible for copyright protection, but the time-period for its effect has long lapsed raising the question of retrospective protection; and TCEs which lack the qualities required for copyright protection, e.g., lack of sufficient originality and well-defined authorship. Such material is, in legal terms, in the public domain, although the communities concerned often challenge the public domain status of such material, especially when it has been recorded or written down without their informed consent.

21. Whether it is desirable to extend new forms of IP protection to this material is the threshold policy question: should TCEs currently in the public domain receive positive intellectual property protection? Should this take the form of rights to prevent or authorize others' use, or should it be limited to rights to equitable remuneration such as a royalty on use by others. Should there be a system of 'moral rights' concerning attribution and integrity

when TCEs are used? While there are *suigeneris* systems that do create such rights (document WIPO/GRTKF/IC/5/INF/3), such approaches raise several policy challenges and questions. These are identified and discussed in the full analysis in the Annex.

22. It is suggested that if States choose to establish positive protection of TCEs, and drawing upon the example of the South Pacific Model Law, 2002, a system of positive protection could:

- (a) enable and facilitate access to and use of TCEs as a basis for further creativity and innovation, whether by members of the relevant cultural community or not;
- (b) in such cases, respect any resulting IP of the creators and innovators;
- (c) ensure however that such uses of TCEs, particularly commercial uses, are coupled with obligations by the user to acknowledge the source, share equitably in any benefits derived from the use of the TCEs and not to make derogatory, libelous, defamatory or fallacious uses of TCEs under any circumstances; and,
- (d) notwithstanding the above, protect sacred and secret expressions against all forms of use and commercial exploitation.

23. The Annex also posits another approach, which may be complementary and which could take the following principles and “building blocks” into account:

(a) pre-existing traditional cultures and TCEs are *inter alia* a basis for further creativity and innovation. Copyright and industrial design law are generally adequate to protect contemporary, tradition-based cultural expressions. IP can be used by the creators either to commercialize their works in furtherance of their economic development, prevent others from doing so, or prevent others from acquiring IP over the same subject matter. Trademarks (including certification and collective marks) and geographical indications, unfair competition, and the protection of undisclosed information (for secret TCEs) are other forms of IP that seem particularly useful;

(b) this implies that the establishment, in a general way, of property rights over all forms of TCEs currently in the public domain is not appropriate, neither as a matter of intellectual property policy nor cultural policy. Property rights over public domain TCEs may stifle the ability of indigenous and traditional persons, as well as non-indigenous and non-traditional persons, from creating and innovating based upon tradition;

(c) however, an absolutely free and unregulated public domain does not meet all needs of indigenous and local communities. In particular:

(i) first, it should be possible for States and indigenous and traditional communities to prevent under certain conditions particular uses, taking place outside the context of the cultural community, of TCEs, such as: (i) uses that falsely suggest a connection with a cultural community; (ii) derogatory, libelous, defamatory, offensive and fallacious uses; and/or (iii) uses of sacred or secret TCEs;

(ii) unfair competition law and other consumer protection laws seem to respond to many of the needs of indigenous and local communities. The nature of unfair competition protection is explained in the Annex. It is a flexible body of IP law, able to cater for new circumstances;

(iii) perhaps for cases where unfair competition law is not applicable, national registers, or even perhaps an international register, could be established for the registration, by communities, of those TCEs whose uses should not be permitted.

Registration would have the advantages of focussing protection on discrete TCEs and those that communities deem worthy of protection and therefore proactively register. Prior registration affords some precision and certainty absent in more general protection systems;

(iv) second, tensions and conflicts between copyright and other IP in contemporary, tradition-based cultural expressions and indigenous/customary responsibilities requires further study, the results of which may lead to suggestions for certain measures for managing those tensions and conflicts.

24. These are not the only possible models, however, and the presentations made during the Committee's fourth sessions showed the diversity and range of possible approaches. The analysis notes that several States have called for the development of new model provisions, guidelines or recommendations to assist States and regional organizations in developing effective systems and to provide coherence to emerging diverse national systems.

25. The analysis suggests that eventually the protection afforded to TCEs could be found in a multi-faceted set of options, using a combination of some of the IP and *suigeneris* options mentioned.

26. The analysis also indicates that, where possible, effective protection for TCEs be based upon known and existing standards, even if they may be adapted and modified to meet specific needs. Doing so takes advantage of established jurisprudence and understanding, so facilitating political acceptance of the solutions, their integration into national and international systems and ultimately their enforcement as known tests and standards can be applied by enforcement officials.

27. Subjects concerning the nature of TCEs, the 1982 WIPO UNESCO Model Provisions on the Protection of Folklore; TCEs as economic and cultural assets; regional and international protection; cultural heritage collections, databases and registers; and the acquisition, management and enforcement of rights are also covered by the analysis.

28. This document should be read together with WIPO/GRTKF/IC/5/INF/3, which comprises a comparative summary of existing *suigeneris* laws for the protection of TCEs. It is envisaged that such a table would eventually form part of the Practical Guide on the legal protection of TCEs. Relevant States and regional organizations are invited to update and render more accurate the information contained in that table, to which further information and annotations may be added in due course to enhance its practical usefulness.

IV. CONCLUSIONS

29. Discussions on the protection of TCEs have at times been characterized as a debate over whether there should be *suigeneris* protection for TCEs, or whether conventional or established IP systems are sufficient. However, it is difficult to draw a firm distinction between these two positions. Some existing laws already give various forms of protection to expressions of traditional culture, generally on the basis of the copyright system (e.g., through varying provisions on the requirement for fixation and on protection for anonymous works). Within the copyright and related rights system, international protection has recently been extended to certain TCEs formerly considered to fall in the public domain: under the WIPO Performances and Phonograms Treaty of 1996, performers of TCEs (or expressions of folklore) receive protection for the aural aspect of their performances. For instance, a

performer of a traditional song or chant has the right to set the conditions for the recording ('fixation') of the performance, and for the way in which the recording is distributed and commercialized, even if the song or chant is not itself eligible for copyright protection (i.e., when it is an "expression of folklore" rather than a "literary or artistic work"). A number of similar *sui generis* elements for TCE protection could be conceived within the conventional IP system. This raises the need to clarify the distinction between an extended, adapted or simply more effectively applied IP system, on the one hand, and a distinct form of *sui generis* right on the other. As the analysis in this document illustrates, discussion of *sui generis* systems raises fundamental policy issues. Further work may be needed to clarify and focus these policy issues, as a possible basis of international consensus on recommendations or guidelines for the protection of TCEs.

30. This document draws on the wider range of experience with the protection of TCEs that has been put before the Committee to record and clarify the range of policy issues and objectives that may need to be weighed when considering options for the protection of TCEs. For policymakers addressing the protection of TCEs, the following series of questions may help illustrate the policy options:

- (a) the threshold question of whether the protection required is a form of IP protection at all, whether as presently available or under adapted, expanded or *sui generis* IP systems;
- (b) whether the goal of protection is essentially positive or defensive protection, or a strategy combining the two;
- (c) what options are presently available under conventional IP systems, including unfair competition, and what options exist for adapted, expanded or *sui generis* elements of existing IP to protect TCEs;
- (d) what options are presently available in contractual or non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws;
- (e) whether, in respect of unprotected TCEs, IP policy objectives as well as cultural and other policies (relating to cultural diversity, creativity and the preservation of cultural heritage, for example) lead to an interest in exploring new, specific *sui generis* systems for their IP protection;
- (f) what mechanisms exist in other local, national or regional systems, including indigenous and customary systems, and what practical or conceptual lessons can be learned from them;
- (g) what policy framework and which policy options are relevant in elaborating systems for the specific *sui generis* protection of TCEs, should this be the route chosen;
- (h) how such *sui generis* systems relate to conventional IP systems particularly in respect of overlapping subject matter; and
- (i) how national systems interact through bilateral, regional or international legal frameworks.

31. To advance discussion, increase the utility of the policy documents prepared for the Committee and enhance the capacity of national policymakers and community representatives, it is suggested that the Secretariat prepare for the Committee's consideration an annotated menu of options for the protection of TCEs, with an analysis of the potential benefits and drawbacks of each option. The menu of options would address the questions set out in paragraph 30 above, and in relation to *sui generis* TCE protection it would address the specific factors listed in paragraph 58 of document WIPO/GRTKF/IC/12. This would make use of the rich amount of material made available to the Committee concerning TCEs, and provide it in a distilled and practical form for policymakers and community representatives.

within the context of continued policy development. It would also provide a basic platform for international cooperation and debate on policy questions. Such an annotated menu of options could also form a useful part of a supplementary resource to the Practical Guide on the legal protection of TCEs, as approved by the Committee at its third session (see WIPO/GRTKF/IC/3/10, par. 155 and WIPO/GRTKF/IC/5/3 par. 294).

32. The development of an annotated menu of policy options would set out clearly what choices need to be addressed when considering new enhanced IP protection for TCEs. No other new tasks are proposed for consideration by the Committee in this document. However, the Committee decided at its fourth session to “revert to the issues of legislative guidance in the form of model provisions and elements of a possible international *suigeneris* system for the protection of folklore at its fifth session, when an updated version of document WIPO/GRTKF/IC/4/3 had been available for some time” (WIPO/GRTKF/IC/4/15, paragraph 92). The Committee may therefore wish to discuss these issues further on the basis of the present document. The annotated menu of policy options would provide a comprehensive and practical basis for the development of recommendations or guidelines at an international level, if the Committee chooses to proceed in that direction. On previous occasions, States and others have called for the development of non-binding model provisions, guidelines or recommendations to assist States and regional organizations in establishing effective national systems. The regional and international protection of TCEs has also been supported by OAPI in its comments on WIPO/GRTKF/IC/4/3. Certain activities are proposed to be undertaken by the Secretariat regarding cultural heritage collections, databases and registers as discussed in WIPO/GRTKF/IC/4/3 and which several Committee Members have supported (e.g., comments of the European Community and its Member States and OAPI on document WIPO/GRTKF/IC/4/3 and statement by Switzerland at fourth Committee session (WIPO/GRTKF/IC/4/15, paragraph 73)).

33. It is also suggested that the analysis of IP protection for TCEs contained in the Annex to this document stay open, so that Committee Members can continue to provide complete, updated and accurate information about current forms of IP protection for TCEs, either through existing IP regimes, adapted IP regimes or through new *suigeneris* systems. This could include relevant examples of the use of IP systems to protect TCEs and copies of any relevant draft or enacted legislative texts to protect TCEs.

34. The Committee is invited: (i) takenoteof andcommentonthisdocumentanditsAnnex andtoencourageitsMemberstocontinuetoprovideneworupdatedinformationtothe Secretariat;and(ii)onthebasisofthis document,toprovidedirectionsforfurtherwork concerningtheIPprotectionofTCEs,including thepossibilityofthedevelopmentofan annotatedmenuofpolicyoptionstoprovide practicalsupportforTCEprotectionandto serveasthebasisfor developmentof recommendationsorguidelines.

[Annex follows]

ANNEX

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I. POLICY CONTEXT AND POLICY OPTIONS

Introduction

1. This document provides a consolidated analysis of the legal protection of traditional cultural expressions (TCEs) (or the synonymous term ‘expressions of folklore’), comprising an updated and extended version of the “Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/4/3) prepared by the WIPO Secretariat. It reviews the policy framework for protection of TCEs, and surveys the available forms of intellectual property (IP) protection for TCEs, through conventional or general IP regimes (including copyright, but also a range of other forms of IP), through adapted and extended IP regimes (such as adaptations of copyright to improve recognition of TCEs), and through new *suigeneris* systems or laws specially created to give IP protection to TCEs.

2. The terms ‘TCEs’ and ‘expressions of folklore’ are used synonymously in international policy discussions concerning this area of intellectual property. ‘Traditional cultural expressions’ or TCEs is used as a neutral working term in this document because some communities have expressed reservations about the negative connotations of the word ‘folklore.’ Protection of TCEs/expressions of folklore is often associated with traditional knowledge, but traditional knowledge (when this term is used in its narrow sense to refer to technical know-how such as traditional ecological or medical knowledge – see “What are ‘Traditional Cultural Expressions’” below) is conceptually separate. The present document does not directly address the protection of traditional knowledge in the narrow sense of the term as described.

Policy context

3. An appropriate context within which to view the legal protection of TCEs is provided by existing and evolving standards and policies concerning several related issues such as: (i) the preservation and safeguarding of tangible and intangible cultural heritage; (ii) the promotion of cultural diversity; (iii) the respect for cultural rights; and (iv) the promotion of creativity and innovation – including that which is tradition-based – as ingredients of sustainable economic development.

4. Cultural heritage and culture lie at the heart of contemporary concerns for individual, community and national identity, international and intra-national cultural exchange, and global creative diversity. The distinct and diverse qualities of the world’s multiple cultural communities are threatened in the face of uniformity brought on by new technologies and the globalization of culture and commerce. New technologies generate unprecedented ways for cultural products to be created, replicated, exchanged and used. Challenges of multiculturalism and cultural diversity, particularly in societies with both indigenous and immigrant communities, require cultural policies that maintain a balance between the protection and preservation of cultural expressions – traditional or otherwise – and the free exchange of cultural experiences. Mediating between the preservation of cultural heritage and cultural distinctiveness on the one hand, and the nurturing and nourishing of “living” culture as a source of creativity and development on the other, is another challenge.

5. As a result, the preservation and safeguarding of cultural heritage and the promotion of cultural diversity are key objectives of several international conventions and programs as well

as regional and national policies, practices and processes. ¹The respect for and protection of cultural rights are addressed in several human rights instruments. ²

6. How does intellectual property, and in particular the IP protection of TCEs, interact with these issues? The relationship between IP and cultural policies relating to heritage, diversity and creativity is complex and requires a balance and coordination. Enhanced appreciation of this relationship requires a clear articulation of the nature and objectives of IP protection, as well as of the range of needs and expectations of holders and practitioners of TCEs as they relate to preservation and/or legal protection of TCEs. The nature of cultural heritage as “living” and as a source of creativity is also pertinent. Of relevance too is the role of the commerce and the marketplace, and the notion of the “public domain.” A central challenge is to address the protection of TCEs in ways that balance the concerns of users, existing third-party rights and the public interest. These issues will be picked up for further attention in the following paragraphs.

7. Some of the key questions at the core of this discussion include: if expressions and representations of cultural heritage receive any form of IP protection, does this simply shift in the objectives of IP protection? How does IP, particularly copyright and related rights, interact with cultural policies that mediate between the preservation of cultural heritage, the promotion of multiculturalism and facilitation of the free flow of cultural experiences? What forms of IP protection for TCEs best serve creativity and development? Where should one draw the line between the inappropriate use of TCEs and use of TCEs as a source of legitimate inspiration? How should IP policies and models ensure that TCEs that receive IP protection are those identified by cultural communities as meriting protection?

Tradition as a source of creativity

8. While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework. Tradition is not immutable. 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. ³As the Japanese industrial designer Sori Yanagi has 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.” ⁴So, as traditional artists and practitioners continually bring fresh perspectives and experiences to their work, tradition can be an important source of creativity and innovation.

¹ Examples at the international level include the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972, Unesco’s Program on Masterpieces of the Oral and Intangible Heritage of Humanity of 1998, a draft Convention for the Safeguarding of Intangible Cultural Heritage being discussed at Unesco, Unesco’s Declaration on Cultural Diversity, 2001, and emerging interest in an international instrument on cultural diversity within the International Network on Cultural Policy (INCP) and Unesco.

² Such as the Universal Declaration of Human Rights, 1948 and the International Covenant on Economic, Social and Cultural Rights, 1966.

³ 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.

⁴ *Japan Times*, June 30, 2002.

9. In traditional music, too, there is continual reworking of available material. It has even been stated that “the folk-songs, by definition, and as far as we can tell, by reality, entirely a product of plagiarism.”⁵ This may be an exaggeration, but variation in traditional cultures comprises “deliberate, intentional... changes and choices introduced by the individual folk artist whose creative genius is not content with mere imitative repetition in the process of appropriating a variant of a tale (or song) as his or her own personal version. Far from being at odds with each other, creativity and tradition, individual and community, together produce vital variability thus keeping alive the very items that their integrated forces help to shape.”⁶

10. Manifestations of traditional cultural heritage are therefore often a source of creativity for indigenous, local and other cultural communities. The unalloyed recreation and replication of past traditions is not necessarily the best way of preserving identity and improving the economic situation of indigenous, local and cultural communities. In recognizing this, the link between cultural heritage, culture and economic development is now being more appreciated. International and regional financial institutions, such as the World Bank, have begun to support cultural development projects that treat culture as an economic resource that is able to contribute to poverty alleviation, local job creation and foreign exchange earning.

11. Handicrafts, a form of tangible cultural expression, exemplify the benefits of combining tradition with creativity. Handicrafts are viewed as both traditional and contemporary, in keeping with the view that traditional cultural expressions reflect a living culture and evolve despite being based on traditional forms and know-how. This reflects the ability of many tradition-bearing communities to combine tradition with the influences and cultural exchanges characteristic of modernity for the purpose of maintaining their identity and improving their social and economic circumstances.⁷ A governmental poverty alleviation program “Investing in Culture” for the Khomani San people in South Africa provides an excellent example. This program is revitalizing the community’s craft-making and enabling the community for the first time to generate its own income.⁸

12. Forms or manifestations of cultural heritage are also a source of inspiration and creativity for the cultural industries, acting as powerful engines of economic growth, generating considerable income and employment fuelled by growing demand for cultural goods and services in an expanding marketplace. Many businesses today, small, medium and large, create wealth using the forms and materials of traditional cultures – local cooperatives that produce and market hand-made crafts, industrial textile manufacturers that employ traditional designs, producers of audio recordings of traditional music, pharmaceutical manufacturers that use indigenous knowledge of healing plants, promoters of tourism, and

⁵ Seeger, P., The Incomplete Folksinger, 1992, quoted in McCann, Anthony, “Traditional Music and Copyright – the Issues”, 1999, p.5.

⁶ Bronner, S.J., Creativity and Tradition in Folklore: New Directions, 1992, quoted in McCann, *op.cit.*, p.6.

⁷ Blake, Janet “Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage (UNESCO), 2002, page 4.

⁸ See further “Traditional Cultural Expressions as Economic and Cultural Assets.”

entertainment conglomerates that employ various forms of traditional representations for motion pictures, amusement theme parks and children's toys.⁹

Tradition, modernity and the market -place

13. However, the relationship between tradition, modernity and the market -place is not always perceived to be a happy one. What is creativity from one perspective may erode traditional culture from another viewpoint. And the imitation or marketing of cultural forms and culturally specific artistic works by the commercial sector might be counterproductive to the welfare of the source community. The creation or use of TCEs outside the context of the cultural community may have a negative impact on that community in subtle yet destructive ways. Many cultural products deeply rooted in the cultural heritage of developing countries have crossed borders and established significant market niches in industrialized countries. However, the commercialization of these cultural transfers has often not benefited the countries of origin. It has been suggested that a serious consequence of this is a gradual impoverishment of the cultural heritage of countries.¹⁰

14. IP-related questions are raised too. Communities who are the bearers and custodians of their cultural heritage argue that while they are unable to acquire IP protection over their cultural heritage and traditional cultures, others from outside the community context are able to acquire IP protection for creations and innovations derived from and inspired by their cultural heritage. Thus, the communities regard themselves as both negatively and positively excluded. Indigenous, local and other cultural communities have complained that their cultural expressions and representations are used without authority in disrespectful and inappropriate ways, causing cultural offense and harm. It is suggested too that the acquisition of IP protection over derivative works threaten the modes of creativity and transmission practiced by cultural communities, or even the very existence of source communities whose relationships are expressed through and maintained by creative expressions and resources. Whether this and other arguments are valid requires a detailed examination of the nature of IP protection, particularly copyright and related rights, and its interaction with the preservation and promotion of cultural heritage and creative diversity. It is important too not to make artificial distinctions between traditional communities and the market -place, as many traditional communities engage in marketing aspects of their culture.

Intellectual property and the meaning of "protection"

15. Most forms of IP, such as copyright, related rights, patents and industrial design rights, establish private property rights in creations and innovations in order to grant control over their exploitation, particularly commercial exploitation, and to provide incentives for the further creation and dissemination of the products of human creativity. In addition, IP protection: (i) facilitates the orderly functioning of markets through the avoidance of confusion and deception (the policy basis of the protection of trademarks and geographical indications), and the prevention of unfair competition; (ii) safeguards the integrity of a right of attribution to certain works and creations (the policy basis of moral rights protection

⁹ "Safeguarding Traditional Cultures: A Global Assessment" (UNESCO and the Smithsonian), quoted in Bergey, Barry "Cultural Diversity, Cultural Equity and Commerce", address delivered at Expert Seminar on Cultural Diversity, OAS, March 19, 2002.

¹⁰ "Cultural Diversity in Developing Countries – the Challenges of Globalization", International Network on Cultural Policy, 2002.

in copyright, for example); and/or (iii) protects undisclosed information from bad faith use or appropriation. IP protection also helps to monetize IP assets. IP protection generates revenue when used strategically in a market context. Its value lies not so much in the right to prevent others from exercising rights but rather in enabling the licensing of IP assets. It can particularly help small businesses in raising venture capital and other forms of equity, and in accessing finance and credit. IP assets can be used as security or collateral for debt finance, or it can provide an additional or alternative basis for seeking investment equity.

16. IP protection must be distinguished from the concepts of “preservation” and “safeguarding.” Document WIPO/GRTKF/IC/5/12 (from paragraph 17) discusses this distinction in the context of the overall work of the Committee). Copyright protects the products of creativity, in the form of original literary and artistic works, against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. The holder of copyright in a work has the exclusive right to prevent or authorize others from undertaking any of those acts, subject to certain exceptions and limitations. The goals of copyright protection are largely to encourage further creativity, encourage public dissemination and enable the holder to control the commercial exploitation of the work. It can also provide protection against demeaning or degrading use of a work, an issue that is often of concern for traditional cultural works.

17. By contrast, preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of (tangible or intangible) cultural heritage in order to ensure its maintenance or viability. ¹¹

18. As Canada pointed out in its comments on WIPO/GRTKF/IC/4/3, in discussing the legal protection of TCEs, it is worth while to recall that the term “protection” may have several different meanings, such as preserving, promoting wider use, controlling use, preventing misuse, or channeling a proper share of benefits to TCE holders. These various forms of protection may be realized through a variety of legal and policy measures aside from IP law. By way of illustration, it may be useful to have an IP right in relation to a legend that was recorded centuries ago on a piece of cloth. Such an IP right could be helpful in preventing others from using the legend in a manner considered inappropriate by a community, such as reproducing the legend on a T-shirt. However, if only a few people know the legend and the language that should be used to recite the legend, “protection” may take the form of measures that would assist people to pass on their knowledge of the legend and the language to the next generation. If the cloth begins to decay, “protection” may take the form of measures to ensure that the cloth is preserved for future generations. In other instances, “protection” could take the form of promoting the legend outside the community in order that others may learn about it and gain a greater understanding and respect for the culture of the originating community.

19. Clarity on what is meant by “protection” is key, because the needs and expectations of TCE holders and practitioners can in some cases be addressed more appropriately by measures for preservation and safeguarding rather than protection in the IP sense. It may be necessary to combine both approaches in a comprehensive strategy: for instance, in projects for the preservation of traditional cultures, that may involve writing down oral works, and scanning or digitizing graphic or written works, there may be sensitive issues relating to ownership and exercise of copyright ensuing from these activities. The exercise of IP rights is

¹¹ See Glossary: Intangible Cultural Heritage, Netherlands Commission for UNESCO, 2002.

also important when TCE holders and practitioners wish to control the commercialization of their TCEs. It is also important that measures for preservation/safeguarding and for IP protection are complementary and mutually supportive.

Cultural heritage and IP protection

20. In relation to the interaction of cultural heritage and IP, a distinction may be usefully drawn between (i) pre-existing, underlying cultural heritage and traditional culture (which may be referred to as traditional culture or folk *stricto sensu*) and (ii) contemporary literary and artistic productions created by current generations of society and based upon or derived from pre-existing cultural heritage and traditional culture.

(i) Pre-existing traditional culture is generally trans-generational (i.e., old) and collectively “owned” 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. Pre-existing traditional culture as such and particular expressions thereof are generally not protected by current copyright or industrial design laws;

(ii) On the other hand, a contemporary literary and artistic production based upon, derived from or inspired by traditional culture that incorporates new elements or expression is a “new” work in respect of which there is generally a living and identifiable creator (or creators). Such a contemporary production may include a new interpretation, arrangement, adaptation or collection of public domain pre-existing cultural heritage and expressions, or even their “re-packaging” in the form of digital enhancement, colorization and the like. Contemporary, tradition-based expressions and representations of traditional cultures are generally protected by existing copyright and industrial design law for which they are sufficiently “original” and “new” respectively. The law makes no distinction based on “authenticity” or the identity of the author – i.e., the originality requirement of copyright could be met by an author or inventor who is not a member of the relevant cultural community in which the tradition originated.

21. For purposes of this analysis, contemporary TCEs that are subject to or eligible for IP protection, particularly copyright and design protection, will be referred to as “contemporary, tradition-based cultural expressions.”

The public domain

22. An integral part of developing an appropriate policy framework within which to view IP protection and TCEs is a clearer understanding of the role, contours and boundaries of the public domain.

23. The “public domain” is used herein in the sense in which the term is used in the copyright context and it refers to elements of IP that are ineligible for private ownership and the contents of which are available for use by any member of the public.¹² The “public domain”

¹² Litman, J., *The Public Domain*, quoted in Bragdon, Susan, “Rights and Responsibilities for Plant Genetic Resources: Understanding the role of the public domain and private rights in the production of public goods”, draft paper delivered at First Meeting of the Advisory Committee for IPGRI project on the public domain, Portland, Oregon, November 14 – 15, 2002.

in this context means something other than “publicly available” – for example, content on the Internet may be publicly available but not in the public domain from a copyright perspective. Similarly, an IP asset such as a collaborative work or a collective mark may be owned by a community but it would not for this reason be part of the public domain. This analysis is aware that the public domain is a construct of the IP system, and that it does not take into account private domains established by customary and indigenous laws. This question is one of the topics being addressed in the study on the relationship between IP and customary and indigenous laws.

24. In common in some ways with plant genetic resources and biological diversity, cultural heritage was in some cases considered as common property (as part of the “universal heritage of humanity”, as is referred to for example in some cultural instruments and declarations¹³), and therefore as public domain.

25. Cultural heritage also shares with plant genetic resources and biological diversity growing calls for a re-evaluation of its public domain status, particularly by indigenous and local communities concerned by the cumulative failure of IP to provide protection to pre-existing cultural heritage coupled with the availability of IP protection for contemporary tradition-based cultural expressions with no corresponding mechanisms to compensate those who preserved and developed the cultural resources (in the case of plant genetic resources and biological diversity, these perceived imbalances were addressed in the form of the FAO’s International Undertaking and more recently the International Treaty, and the Convention on Biological Diversity, respectively).¹⁴

26. TCE holders and practitioners question whether the public domain status of cultural heritage offers the greatest opportunities for creation and development. Should all historic materials be in the public domain, and be denied protection because they are not recent enough? Merely providing IP protection for contemporary, tradition-based cultural expressions is an inappropriate “survival of the fittest” approach that does not best serve cultural diversity and cultural preservation, it is argued. Almost everything created has cultural and historic antecedents, and systems should be established that yield benefits to cultural communities from all creations and innovations that draw upon tradition.

27. On the other hand, the public domain character of cultural heritage is valuable. It serves several of the objectives associated with the safeguarding and preservation of cultural heritage, and it is argued that the public domain character of cultural heritage is essential for its renewal and survival. Preservation should nourish living cultural practices and nurture cultural revitalization, such as through national folk life programs. The public domain status of cultural heritage is also tied to its role as a source of creativity and innovation, and it is argued that it is through sharing and contemporary adaptation and arrangement that cultural

¹³ The Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), the Recommendation on the Safeguarding of Traditional Culture and Folklore (1989) and more recently in the Unesco Universal Declaration on Cultural Diversity.

¹⁴ Bragdon, Susan, “Rights and Responsibilities for Plant Genetic Resources: Understanding the role of the public domain and private rights in the production of public goods”, draft paper delivered at First Meeting of the Advisory Committee for IPGR project on the public domain, Portland, Oregon, November 14 -15, 2002.

heritage is kept alive and transmitted to future generations.¹⁵ As the European Community and its Member States have stated in their comments on document WIPO/GRTKF/IC/4/3, “the fact that folklore for the most part is in the public domain does not hamper its development – to the contrary, it allows for new creations derived from or inspired by it at the hands of contemporary artists.” In its comment on WIPO/GRTKF/IC/4/3, Canada expressed the view that “copyright encourages members of a community to keep alive “pre-existing cultural heritage” by providing individuals of the community with copyright protection when they use various expressions of “pre-existing cultural heritage” in their present-day creations or works.”

28. It is worth recalling that copyright protection grants the author an exclusive right only to the specific form of the contemporary expression; it does not shield any idea or fact contained in the copyright work, and it allows for “fair use” even of the expression itself.

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29. Neither members of the relevant cultural communities nor the cultural industries would be able to create and innovate based on cultural heritage if private property rights were to be established over it (depending on the nature of the property rights and exceptions to them). By overprotecting cultural expressions, the public domain diminishes, leaving fewer works to build on. Therefore, indigenous artists wishing to develop their artistic traditions by reinterpreting traditional motifs in non-traditional ways, and wanting to compete in the arts and crafts markets, may be inhibited by these regimes. The consequence is that these laws may “freeze” the culture in a historic moment, and deny traditional peoples a contemporary voice.¹⁷

30. Some Committee participants have therefore argued that any protection for TCEs should strike a proper balance between protection against abuses of TCEs and the encouragement of their further development and dissemination, as well as individual creativity inspired by TCEs.¹⁸ They tend to believe that existing IP strikes this balance. Therefore, the principal means of protecting TCEs should be conventional IP, supplemented, as required by the conditions/needs of local communities, by specific laws that address specific problems. As the European Community and its Member States have stated:

“...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

¹⁵ See Uchtenhagen, Ulrich, “Protection of Adaptations and Collections of Expressions of Folklore”, National Symposium on the Legal Protection of Expressions of Folklore, Beijing, September 13 to 15, 1993.

¹⁶ Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, quoted in Eldred v. Ashcroft, 537 U.S. 2003.

¹⁷ See Farley, Christine Haight, “Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?” Connecticut Law Review, Fall, 1997.

¹⁸ For example, Canada; China; Ecuador; Kyrgyzstan; Malaysia; Mexico; Republic of Korea; Romania; Switzerland; United States of America.

features: its dynamics. There is a point where a line must be drawn between the public domain and protected IP.... the realm of IP protection should not be extended to a point where it becomes diffuse and legal certainty diluted.”¹⁹

31. Several countries indicated in their responses to the 2001 WIPO questionnaire on TCEs that expressions of traditional cultures are regarded as part of the public domain. These include Australia, Belgium, Canada, Colombia, Czech Republic, Greece, Hungary, Italy, Netherlands, Honduras, Japan, Kyrgyzstan, Republic of Korea, the Russian Federation and Viet Nam.

32. Certainly, cultural exchanges and communal flows have long marked music and other cultural forms. Musical traditions such as jazz emerged in the early twentieth century in cultural crossroads such as New Orleans, combining elements of African American, Afro-Caribbean and European cultures.²⁰ Rock music evolved from blues, valuing rewarding imitation, revision and improvisation. In this context, copyright does not prevent artist staking from the “commons.” On the contrary it supports the idea that new artists build upon the works of others and it rewards improvisation within a tradition.²¹

33. It is suggested therefore that a robust public domain, rather than being the antithesis of copyright protection, is the foundation upon which the copyright system works. It is the availability of public domain resources that enable exchange and creativity. However, in respect of TCEs, should protection of the public domain imply a regime that values only contemporary creativity and leaves “traditional” creativity absolutely free to be used in an unregulated manner?

Needs and expectations of TCE custodians

34. In regard to the needs and expectations of the custodians of TCEs, more than one IP strategy can be identified. An overview of different IP strategies for TK and TCEs generally is provided in document WIPO/GRTKF/IC/5/12 (from paragraph 17). During the fact-finding missions and consultations conducted by WIPO since 1998, three approaches have been encountered:

(a) *IP protection to support economic development:* some communities wish to acquire and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development;

(b) *IP protection to prevent unwanted use by others:* communities may wish to acquire IP in order to be able to actively exercise IP rights that prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally offensive or demeaning use.

In both of the above approaches, owners and custodians of TCEs wish to protect their TCEs by actively asserting IP rights. In the work of the Committee, this is termed “positive protection.” There are two aspects of such positive protection – TCE holders may use IP

¹⁹ WIPO/GRTKF/IC/3/11.

²⁰ Bergey, *op cit.*

²¹ Vaidhyathan, Siva *Copyrights and Copy wrongs*, 2001 (New York University Press), 125.

protection to stop unauthorized or inappropriate acts by third parties, or they may use it as the basis for commercial and other relations in their dealings with other partners. For instance, a community may use IP protection to stop the use of a traditional design by a manufacturer, but the community can also use the same protection as the basis of their own commercial enterprise, or to license and control appropriate use of the TCE by others and to structure and define the financial or other benefits from this authorized use.

(c) *Defensive strategies to protect TCEs:* A third approach is to employ defensive protection strategies aimed at preventing others from gaining or maintaining IP over derivations and adaptations of TCEs and representations. Those adopting this approach are not themselves interested in acquiring IP protection. They are however interested in safeguarding their cultural heritage and cultural expressions, and, to that end, believe that no IP should be obtained by anyone over them.

35. As slightly different defensive objective is to prevent the use and commercialization of TCEs outside of their customary context (as opposed to preventing the acquisition of IP rights over them), although these may often coincide. IP rights may be exercised to defend against unwanted use of TCEs. These may include: (i) uses that falsely suggest a connection with a community; (ii) derogatory, libelous, defamatory or fallacious uses; (iii) uses of sacred and secret TCEs. The Saami Council has cited the Saami traditional dress as an example of a cultural expression misused by the tourism industry in an inappropriate way. The Saami people have no interest in trading with this part of their cultural heritage. Their sole interest is to ensure that the dress is not used in inappropriate ways by unauthorized persons.²²

36. It is important to be clear to what extent and in which cases IP protection can meet the needs, as some of them are perhaps more concerned with preservation and safeguarding than IP protection. Unfair competition law and other consumer protection laws may be useful, especially since concerns about commercial misuse of TCEs often arise from the perception that they are being used to create a misleading impression that a product is produced or endorsed by a traditional community.

37. Generally speaking, one single form of protection for traditional cultural expressions is unlikely to meet all the needs of the traditional community: they may need to use a range of positive and defensive legal tools to achieve their chosen objectives in protecting and preserving their traditional culture.

Key policy questions and concluding remarks

38. A key question perhaps is whether limiting IP protection to contemporary, tradition-based cultural expressions, and leaving pre-existing cultural heritage as part of an unregulated public domain, adequately meets cultural as well as intellectual property policies and objectives. Does it offer the greatest opportunities for creativity and economic development? Does it best serve cultural diversity and cultural preservation? Does it address the concerns of the custodians of traditional cultures?

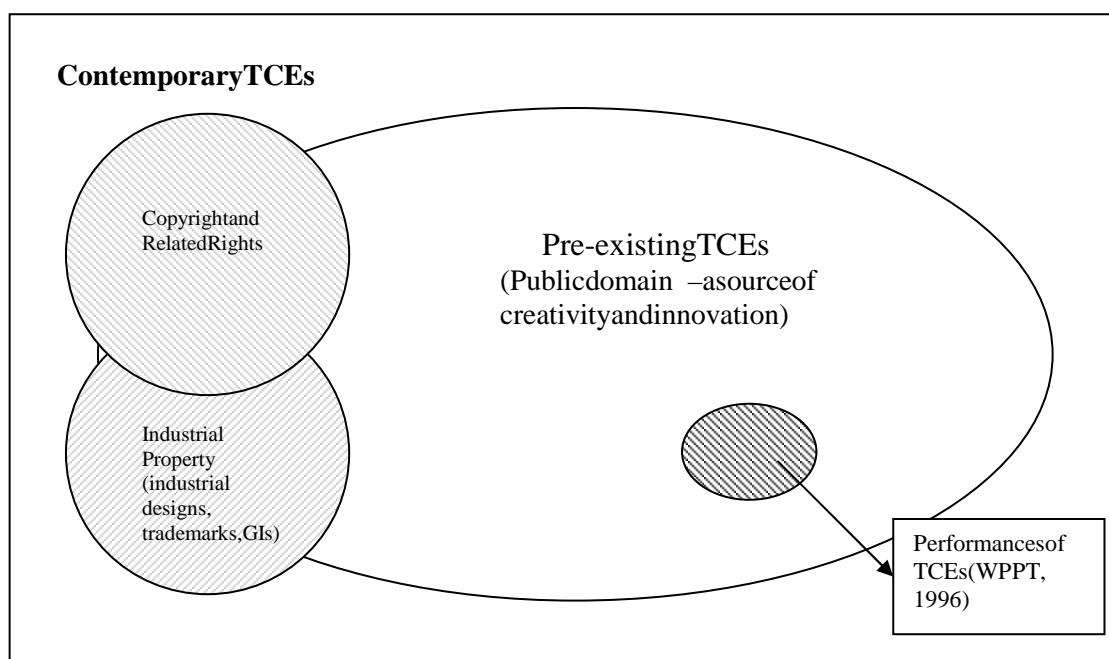
²² Statement by Saami Council, Fourth Session of the Intergovernmental Committee, December 9 to 17, 2002.

No IP protection for public domain TCEs: Existing IP adequate/Adapted IP standards and Special IP measures

39. Some participants in the Committee have argued that existing conventional IP rights are adequate for the protection of TCEs, if their full potential is explored. There are many examples of traditional communities successfully protecting songs, graphic works and other literary and artistic works through copyright and performers' rights. The current balance of interests in the IP system means that members of cultural communities as well as others are free to create and innovate on the basis of their cultural traditions, and acquire and benefit from any IP that may subsist in the creations and innovations. This contributes to their economic development, as well as meeting certain objectives of cultural heritage and cultural exchange policies. IP protection provides incentives for the creation and dissemination of new intellectual creations. Some proponents of this view consider that some adaptation to existing rights and/or some special measures within the IP system may be necessary and desirable to meet specific needs – for instance, copyright protection for works that have not been fixed (e.g. works that have been passed on only in oral form) and special remedies for copyright infringement that is also culturally offensive.

40. Within the copyright and related rights system, international protection has recently been extended to certain TCEs formerly considered to fall into the public domain: under the WIPO Performances and Phonograms Treaty of 1996, performers of TCEs (or expressions of folklore) receive protection for the aural aspect of their performances: for instance, a performer of a traditional song or chant has the right to set the conditions for the recording ('fixation') of the performance, and for the way in which the recording is distributed and commercialized, even if the song or chant is not itself eligible for copyright protection. Hence, apart from the public domain, is already subject to private rights, albeit indirectly.

Diagram 1



Property rights over public domain TCEs – sui generis systems

41. On the other hand, many Committee participants, communities and other stakeholders call for the establishment of legal protection for pre-existing TCEs which are presently in the public domain. This situation arises in two general ways: TCEs that might once have been eligible for copyright protection, but the time-period for its effect has long lapsed (raising the question of retrospective protection); and TCEs which inherently lack the qualities required for copyright protection (e.g. lack of sufficient originality and well-defined authorship). Such material is, in legal terms, in the public domain, although the communities concerned often challenge the public domain status of such material (especially when it has been recorded or written down without their informed consent).

42. Whether it is desirable to extend new forms of IP protection to this material is the threshold policy question: should TCEs currently in the public domain receive positive intellectual property protection? Should this take the form of right to prevent or authorize others' use, or should it be limited to right to equitable remuneration (such as a royalty on use by others), or should there be a system of 'moral rights' concerning attribution and integrity when TCEs are used? While there are *sui generis* systems that do create such rights (see the various systems summarized in document WIPO/GRTKF/IC/5/INF/3), such approaches raise several policy challenges and questions. These include:

(a) How should the needs for recognition of collective ownership and for indefinite terms of protection be addressed? Collective marks and geographical indications are examples of IP rights that are collectively owned; many copyright works (such as multimedia works) have multiple authors and rights associated with them that require a collective approach to managing and enforcing rights. Trademarks and geographical indications can be protected indefinitely, but the claims for indefinite protection concern mechanisms close to copyright, related rights and industrial designs, which have traditionally had limited terms of protection, with protected material passing into the public domain;

(b) Who would "own" and/or manage the rights in "public domain" TCEs? This could be the State or a State-appointed authority, but it need not be. As the United States of America points out in its comments on WIPO/GRTKF/IC/4/3, it may be problematic for the State to hold or decide who holds rights in TCEs: "Governments are contemporary and ephemeral political entities, not the tradition-bearers. In some cases, the State may be hostile to traditional communities within their borders." The United States of America also notes that while the question of "competent authority" might be a decision that should be taken within the community, individuals in communities do not always agree on who should hold the authority. The objectives should probably be to ensure that any benefits flow to the appropriate cultural communities, if they can be identified. Existing or new collective management organizations could play a role in managing the rights for the direct benefit of the relevant communities;

(c) What about "non-traditional" creations that are also in the public domain (such as the works of Shakespeare, Greek, Egyptian, Roman and Babylonian historical events and stories which have long been used as the subjects of operas, books and plays, and more recent works that have fallen into the public domain)? Should "traditional" creations enjoy a privileged legal status *vis-à-vis* other public domain "non-traditional" creations? Here one needs particular clarity on what is meant by "traditional." Separate IP rules for traditional and

non-traditional creations may be difficult to sustain, but this is a policy matter for decision by States. Special systems for public domain materials of a “traditional” nature may have to apply also to other materials that are also in the public domain;

(d) this last point is closely related to the need to define the “communities” that would be entitled to special protection. Are we speaking specifically about “indigenous peoples” and “local communities” as those terms are understood today? Is the creation of a *suigeneris* IP regime for certain communities (such as indigenous or local peoples, as against all other “non-Indigenous” or “non-local” persons) acceptable as a matter of policy? National treatment principles under international treaties on IP may have implications for a specialized domestic regime for the protection of TCEs: if the TCE regime was considered to be an IP right that fell within the scope of such international obligations, this could require extending protection beyond local indigenous populations to certain foreign nationals. National treatment need not always apply, either because international protection may be determined on other points of attachment, such as reciprocity, or because the TCE regime would fall outside the scope of IP law covered by treaty obligations. Nonetheless, this may become a substantive policy and legal question. In addition, as the U.S.A. pointed out in its comments on WIPO/GRTKF/IC/4/3, if protection for identifiable communities was established, it would be necessary to consider how to treat individuals who continue to practice their traditions but who live outside their communities;

(e) should TCEs in the public domain, if not receiving blanket positive protection, receive some form of defensive protection against certain uses, such as: (i) use that falsely suggests a connection with a community; (ii) derogatory, libelous, defamatory or fallacious uses; (iii) uses of sacred and secret TCEs. As already noted, some States and regional organizations have already adopted measures with this as their objective, such as measures that seek to prevent the unauthorized incorporation of indigenous or traditional signs and symbols in trademarks. Consumer protection laws are useful and relevant in this context;

(f) should only certain uses of TCEs require consent (existing *suigeneris* systems distinguish between customary/non-customary uses, and commercial and non-commercial uses, for example);

(g) should the documentation of public domain TCEs form part of an IP strategy;

(h) should protection be of a “blanket” nature or should prior registration of distinct and specified TCEs be a requirement? If so, can existing registries, lists and inventories established in cultural heritage programs play a role;

(i) how should prior and continuing uses of TCEs be dealt with by a new *suigeneris* system;

(j) how would such systems line up with existing IP rights and obligations under international, regional and bilateral conventions, treaties and trade agreements?

Subsidiary questions

43. Subsidiary questions are fragments of these larger key policy questions such as:

(a) how does IP law interact with non-IP legal systems, such as cultural heritage, consumer protection, marketing and labeling laws and instruments;

(b) how should relevant customary and indigenous laws and protocols be recognized and respected, whether using existing IP or in establishing *suigeneris* IP systems;

(c) in addition to the legal availability or creation of rights in TCEs, what supporting institutional structures, programs and measures are needed to turn legal systems of protection into truly effective and working systems which benefit the custodians of TCEs;

(d) as anthropologists, other field workers, museums and archives lie at the junction between communities and the marketplace, how do their activities affect efforts to legally protect TCEs.

Possible approaches to protection

44. It is suggested that if States choose to establish positive protection of TCEs, and drawing upon the example of the South Pacific Model Law, 2002, a system of positive protection could:

(i) enable and facilitate access to and use of TCEs 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 of the creators and innovators;

(iii) ensure however that such uses of TCEs, particularly commercial uses, are coupled with obligations by the user to acknowledge the source, share equitably in any benefits derived from the use of the TCEs and not to make derogatory²³, libelous, defamatory or fallacious uses of TCEs under any circumstances; and,

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

45. Another approach, which may be complementary, could take the following principles and “building blocks” into account:

(a) pre-existing cultural heritage is *inter alia* a basis for further creativity and innovation. This is linked with its public domain character and corresponds with a robust public domain as a source of exchange and creativity. Copyright and industrial designs law are generally adequate to protect contemporary, tradition-based cultural expressions. IP can be used by the creator either to commercialize their works in furtherance of their economic development, prevent others from doing so and/or prevent others from acquiring IP protection over the cultural expressions. Trademarks (including certification and collective marks) and geographical indications, unfair competition, and the protection of undisclosed information (for secret TCEs) are other forms of IP that seem particularly useful;

(b) it appears then that the establishment, in a general way, of property rights over all forms of TCEs currently in the public domain is not appropriate, neither as a matter of intellectual property policy nor cultural policy. Property rights over public domain TCEs may

²³ As the U.S.A. pointed out in its comment on WIPO/GRTKF/IC/4/3, however, restrictions on derogatory uses may be impermissible limitations on free speech in the U.S.A.

stifle the ability of indigenous and traditional persons, as well as non-indigenous and non-traditional persons, from creating and innovating based upon tradition. It appears too that, based upon views expressed by several States, not all States are persuaded of the desirability and need for the creation of property rights over public domain TCEs;

(c) however, an absolutely free and unregulated public domain does not meet all needs of indigenous and local communities, particularly in respect of inappropriate uses of their TCEs. In particular:

(i) first, it should be possible for States and indigenous and traditional communities to prevent particular uses of public domain TCEs taking place outside the context of the cultural community, such as: (i) uses that falsely suggest a connection with a cultural community; (ii) derogatory, libelous, defamatory, offensive and fallacious uses; and/or (iii) uses of sacred and secret TCEs;

(ii) unfair competition law and other consumer protection and marketing laws seem to respond to many of the needs in this respect of indigenous and local communities. A relevant example of a “truth in marketing” law is the Indian Arts and Crafts Act of the U.S.A., described further below in this document. An advantage of unfair competition is its flexibility. It is also a concept already understood by courts improving the likelihood of effective enforcement. The nature of unfair competition protection is explained elsewhere in this document;

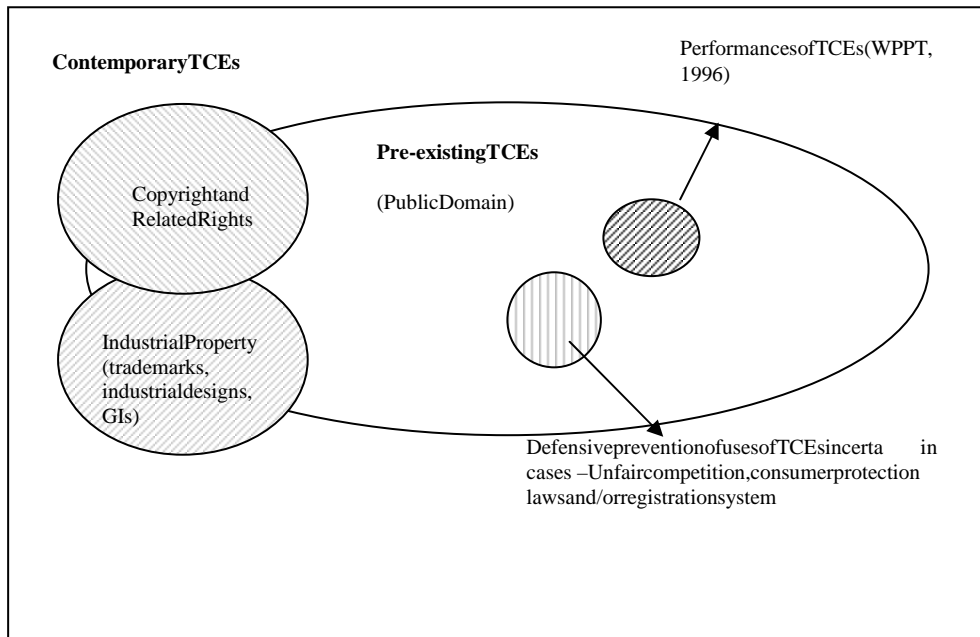
(iii) perhaps for cases where unfair competition law is not applicable, national registers, or even perhaps an international register, could be established for the registration, by communities, of those TCEs whose uses should not be permitted. Registration would have the advantages of focussing protection on discrete TCEs and those that communities deem worthy of protection and therefore proactively register. Prior registration affords some precision and certainty absent in more general protection systems;

(iv) second, tensions and conflicts between copyright and other IP in contemporary, tradition-based cultural expressions and indigenous/customary responsibilities requires further study, the results of which may lead to suggestions for certain measures for managing those tensions and conflicts.

(See diagram 2 on the following page, which attempts to depict a system comprising these building blocks).

46. These are not the only possible models, however, and the presentations made during the Committee’s fourth sessions showed the diversity and range of possible approaches. It seems that neither existing IP standards, nor the 1982 Model Provisions, alone are sufficient in meeting the needs and expectations of indigenous and local communities, and that the testing of alternative models, using a combination of IP and non-IP measures, is desirable. In this respect, States and others have called for the development of new model provisions, guidelines or recommendations to assist States and regional organizations in developing effective systems and to provide coherence to emerging national systems representing a diversity of approaches. The involvement of affected communities and TCE holders is key to this policy development.

Diagram2



47. Eventually, the protection afforded to TCEs could be found in a multi-faceted set of options, using a combination of some of the IP and *suigeneris* options mentioned above. Which options are the most suitable, viewed from the perspective of intellectual property and relevant cultural policies, is explored more fully in the remainder of this document.

II. WHAT ARE “TRADITIONAL CULTURAL EXPRESSIONS”?

Introduction

48. The meaning and scope of the term “traditional cultural expressions” and other terms referring to more or less the same subject matters such as “expressions of folklore,” “indigenous culture and intellectual property” and “intangible and tangible cultural heritage” (which is perhaps the most comprehensive term) 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 expression, knowledge, beliefs, products, processes of production and space that originate in many communities throughout the world.²⁴

49. 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 “traditional cultural expressions” is a complex and subjective question,

²⁴ A detailed discussion on questions of terminology is provided in document WIPO/GRTKF/IC/3/9.

and there are now widely -accepted definitions of these terms. ²⁵

50. The terms ‘TCEs’ and ‘expressions of folklore’ are used synonymously in international policy discussions concerning this area of intellectual property. ‘Traditional cultural expressions’ or TCEs is used as a neutral working term in this document because some communities have expressed reservations about the negative connotations of the word ‘folklore.’ Protection of TCEs/expressions of folklore is often associated with traditional knowledge, but traditional knowledge is conceptually separate. The present document does not address the protection of TK, such as specific systems for the protection of traditional ecological or medical knowledge.

Tangible and intangible expressions of culture

51. “Expressions of” traditional culture (or “expressions of” folklore) may be either intangible, tangible or, most usually, a combination of the two. In its comments on WIPO/GRTKF/IC/4/3, the U.S.A. gave anumber of examples of TCEs that combine tangible and intangible elements: African American quilts depicting Bible stories in appliquéd designs; the practice of “mumming” in Newfoundland during Christmas season where villagers act out elaborate charades, play music, eat, drink, dance and make disguising costumes; and the Mardi Gras “Indians” of New Orleans who exhibit a true example of tangible (costumes, instruments, floats) and intangible (music, song, dance, chant) elements of folklore that cannot be separated. 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. ²⁶

52. 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.

Use of the term “traditional”

53. As already discussed, culture 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. ²⁷ Thus, the term “traditional” does not mean “old” but rather that the cultural expressions derive from or are based upon tradition, identify or are

²⁵ See Paley 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.

²⁶ Idem.

²⁷ 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.

associated with an indigenous or traditional people and may be made or practised in traditional ways.

54. Hence, as already discussed, there is a distinction between “pre-existing” cultural heritage and modern, evolving cultural expressions. Put another way, one can draw a distinction between (i) pre-existing, underlying traditional culture (which may be referred to as traditional culture or folklore *stricto sensu*) and (ii) literary and artistic productions created by current generations of society and based upon or derived from pre-existing traditional culture or folklore.

55. This distinction is also reflected in some national laws, such as of Tunisia (which refers to both “folklore” and “works inspired by folklore”).²⁸ The Hungarian Copyright Act of 1999 excludes expression of folklore from protection under copyright law, but, under Article 1, par.(7), “this may not prejudice copyright protection due to the author of a folk-art-inspired work of individual and original nature.” In addition, the Tunis Model Law on Copyright, 1976 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 as special (*suigeneris*) type of copyright protection.

56. While this distinction is not necessarily always a clear one because of the “living” and cumulative nature of cultural heritage, it is relevant to an IP analysis. This is because new arrangements, adaptations and 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 *suigeneris* mechanisms or systems may be necessary.

57. 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 revival of traditional cultural expressions may not be.

The relationship between “traditional cultural expressions” and “traditional knowledge”

58. The legal protection of TCEs (or expressions of folklore) has been the subject of discussion for many decades. As far back as 1967, a modification was made to the Berne Convention to provide protection for unpublished works of unknown authors, including expressions of folklore (see paragraph 73 below), and in 1982 Model Provisions for national laws were developed under the auspices of WIPO and UNESCO. Since then, several national IP laws have incorporated these provisions, and certain new *suigeneris* systems have also emerged. There is therefore considerable experience to date with the legal protection of TCEs, although more is needed. Intergovernmental discussions concerning TCEs have generally involved representatives of copyright offices and ministries and departments dealing

²⁸ Law 94 -36 of February 24, 1994 on Literary and Artistic Property.

with culture, heritage, tourism, justice and education. At the international level, extensive work on the safeguarding and preservation of cultural heritage and the promotion of cultural diversity has been and is being undertaken mainly by UNESCO. As noted earlier, the legal protection of TCEs is appropriately viewed and considered in relation to intellectual property and cultural policies and objectives addressing cultural heritage preservation, the promotion of creativity and cultural diversity.

59. The concept of “traditional knowledge” has emerged more recently in intellectual property policy circles. The concept is used in the intellectual property context in two senses. It is sometimes used in a narrow sense to refer to “technical” know-how and knowledge related to or associated with biodiversity conservation, agriculture, medicine and genetic resources, among others in similar areas. In this case, the nature of the discourse is different to that which has taken place over decades in respect of cultural expressions, as it involves principally the laws of patents and trade secrets, a distinct range of stakeholders and a particular policy context related *inter alia* to the environment, agriculture, biodiversity and health. The term “traditional knowledge” is however also sometimes used in a broader sense to refer to both technical know-how and knowledge and also traditional expressions and manifestations of cultures in the form of music, stories, paintings, handicrafts, languages and symbols, performances and the like, i.e. TCEs.²⁹

60. There is often a closer relation between “technical” traditional knowledge and traditional artistic expressions. Some Committee participants have pointed to³⁰ the holistic nature of traditional cultural and knowledge systems, and the need to recognize the complex interrelations between a community’s social and cultural identity, and the specific components of its knowledge base, where traditional technical know-how, cultural expressions and traditional narrative forms, traditional ecological practices, and aspects of lifestyle and spiritual systems may all interact, so that an attempt to isolate and separately define particular elements of knowledge or culture may create unease or concern. One approach to dealing with this concern is to distinguish clearly between the holistic and interconnected nature of the underlying traditional knowledge and culture as the protected subject matter, and the legal mechanisms that are defined to give specific forms of legal protection to this material (see the parallel discussion in documents WIPO/GRTKF/IC/5/12, from paragraph 36, and WIPO/GRTKF/IC/5/8, from paragraph 32).

61. However, concerns have been expressed about subsuming cultural expressions entirely under the general concept of “traditional knowledge” in its broader sense. Given the uncertain scope of traditional knowledge, this may lead to a loss of context for the protection of cultural expressions, since it can involve a different set of stakeholders, legal tools and legal principles, and could lead to a loss of extensive previous work on cultural expressions and folklore. Protection of TCEs may also need to take account of a different range of cultural and intellectual property policies, and often involve different national authorities apart from industrial property offices or environmental or agricultural authorities with an interest in genetic resources and technical TK. A number of Committee participants have

²⁹ This issue is discussed at more length in documents WIPO/GRTKF/IC/5/12 and WIPO/GRTKF/IC/5/8.

³⁰ For example Brazil (WIPO/GRTKF/IC/3/17, para. 220) and Thailand (WIPO/GRTKF/IC/3/17, para. 187); see the discussion in WIPO/GRTKF/IC/5/12, paragraph 36 and document WIPO/GRTKF/IC/5/8, from paragraph 104.

requested that more time be set aside to focus particularly on TCE issues (a point also made in Canada's comments on document WIPO/GRTKF/IC/4/3).

62. Several States and other stakeholders have argued that, while recognizing the links between them, TCEs and technical traditional knowledge should be dealt with in two parallel and complementary tracks, at least as a methodological device. For example, at the third session of the Committee, the European Union and its Member States stated that “the Committee should continue to work to establish a dividing line between TK and folklore... and that the different legal tracks be explored which may be complementary in analyzing these two facets.... it [is] necessary to define the scope of traditional TK with regard to biodiversity and leave folklore and handicrafts to be covered by other measures.”³¹ The Delegations of Canada,³² China³³, Venezuela³⁴ and the United States of America³⁵ expressed roughly similar views.

63. A useful way of explaining the relationship between technical traditional knowledge and TCEs is to articulate the distinctions between them using the language and logic of different forms of IP protection (see the general discussion on this point in document WIPO/GRTKF/IC/5/12, from paragraph 41). So, for example, as some forms of IP protection cover the content of knowledge (notably patents and trade secrets), the protection of “traditional knowledge” may be said to refer to the protection of the content or substance of traditional know-how, skills, practices and learning. On the other hand, copyright, related rights and design rights protect specific forms or expressions of traditional knowledge. Therefore, the protection of “traditional cultural expressions” may be said to refer to the protection of expressions of traditional knowledge. Similarly, trademarks, geographical indications and certification and collective marks protect distinctive signs, symbols and indications, thus creating a third category of traditional knowledge subject-matter, namely traditional reputation, signs, indications and symbols. These categories are general and the boundaries between them are indistinct. Just as different forms of IP overlap and intersect in relation to the same creation, distinct forms of IP protection may be applied simultaneously to the various elements of the same underlying traditional creation or innovation. For instance, many handicrafts have technical as well as aesthetic qualities, and may be protected by a combination of the law of industrial property, copyright or both. This is of course to be expected, and does not only apply to “traditional” creations and innovations (software, for example, can be protected by both patents and copyright). For this reason, however, the eventual Practical Guide which the Secretariat is developing will address both traditional cultural expressions as well as related traditional knowledge (technical know-how).

64. A similar, yet more basic way is to regard TCEs and technical traditional knowledge as a sub-set of “traditional knowledge” in the broadest sense. Some TCEs may after all be described as cultural expressions of traditional knowledge (or, traditional knowledge expressed in cultural forms), while technical traditional knowledge is the content or know-how and skills of the traditional knowledge. Such a formulation allows each to be accorded distinct treatment when appropriate while recognizing their relatedness as forms of traditional knowledge. This has been the approach previously followed by the WIPO Secretariat for

³¹ WIPO/GRTKF/IC/3/17 at para. 218.

³² Para. 235.

³³ Para. 242.

³⁴ Para. 286.

³⁵ Para. 254.

purposes of the fact - finding missions, for example. Parallel documents concerning traditional knowledge discuss this distinction further (e.g. WIPO/GRTKF/IC/5/8 from paragraph 18).

65. The renewed identification of cultural expressions as worthy of distinct consideration in parallel with related discussions about technical knowledge is desirable in order that the legal protection of cultural expressions be viewed within the context of relevant policies and objectives, and that it draws appropriately upon previous work in this area, takes into account the relevant IP systems (notably but not only copyright and related rights) and involves relevant stakeholders. It may be considered in the future whether the Committee should establish a subsidiary working group or other subsidiary body which would address in a focussed manner and report to the Committee on particular topics such as TCEs in which cultural experts and representatives of copyright offices and other relevant departments and relevant IGOs and NGOs could participate. In view of the continuing interest in this subject of the WIPO Standing Committee on Copyright and Related Rights, the documents and reports of such subsidiary bodies and of the Committee could be made available to it for background information.

A working description of traditional cultural expressions

66. While not constituting a definition as such, a working description of traditional cultural expressions may be said to be (using the description in the Model Provisions, 1982 as a useful starting point):

“traditional cultural expressions” 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:

- (a) verbal expressions, such as folktales, folk poetry and riddles, signs, symbols and indications;
- (b) musical expressions, such as folk songs and instrumental music;
- (c) expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (d) tangible expressions, such as:
 - (i) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
 - (ii) crafts;
 - (iii) musical instruments;
 - (iv) architectural forms.”

67. Document WIPO/GRTKF/IC/5/12 commented that: “traditional cultural expressions (TCEs) could be used synonymously with the expressions of folklore and generally in line with existing national sui generis law on folklore and the UNESCO -WIPO model provisions, to mean tangible or intangible works or productions, and forms or expressions of traditional

knowledge and traditional cultural heritage, which have the characteristics of a traditional heritage associated with a community. This reflects the way in which protection may be given to an expression as such, and not only to the content.”

III. A SHORT HISTORY OF INTELLECTUAL PROPERTY AND THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

68. Previous activities of WIPO in the field of intellectual property and TCEs, several of which were undertaken in cooperation with UNESCO, have over a period of more than 30 years, identified and sought to address several legal, conceptual, operational and administrative needs and issues related to intellectual property and TCEs.

Provision of international protection for “unpublished works” in the Berne Convention for the Protection of Literary and Artistic Works in 1967

69. The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) made an attempt to introduce copyright protection for folklore at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contain the following provision:

“(4)(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”

“(b) Countries of the Union which makes such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.”

70. This Article of the Berne Convention, according to the intentions of the revision Conference, implies the possibility of granting protection for TCEs. Its inclusion in the Berne Convention responds to calls made at that time for specific international protection of TCEs.

Adoption of the Tunis Model Law on Copyright for Developing Countries, 1976

71. To cater for the specific needs of developing countries and to facilitate the access of those countries to foreign works protected by copyright while ensuring appropriate international protection of their own works, the Berne Convention was revised in 1971. It was deemed appropriate to provide States with a text of a model law to assist States in conforming to the Convention’s rules in their national laws.

³⁶ See Ficsor, M., “Attempts to Provide International Protection for Folklore by Intellectual Property Rights”, paper presented at the WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 1997, p. 17; Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, 1987) pp. 313-315. Only one country, India, has made the designation referred to in the Article.

72. Thus, in 1976, the Tunis Model Law on Copyright for Developing Countries was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO. The Tunis Model Law provides specific protection for works of national folklore. Such works need not be fixed in material form in order to receive protection, and their protection is without limitation in time.³⁷

The Model Provisions, 1982

73. Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions were adopted in 1982 under the auspices of WIPO and UNESCO (“the Model Provisions”).³⁸

74. During the course of the development of the Model Provisions, it had been agreed by a Working Group convened by WIPO and UNESCO that: (i) adequate legal protection of folklore was desirable; (ii) such legal protection could be promoted at the national level by model provisions for legislation; (iii) such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; (iv) the said model provisions should also allow for protection by means of copyright and neighboring rights where such forms of protection could apply; and, (v) the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of folklore.

75. The Model Provisions were developed in response to concerns that expressions of folklore, which represent an important part of the living cultural heritage of nations, were susceptible to various forms of illicit exploitation and prejudicial actions. More specifically, as stated in the Preamble to the Model Provisions, the Expert Committee believed that the dissemination of folklore might lead to improper exploitation of the cultural heritage of a nation, that any abuse of a commercial or other nature or any distortion of expressions of folklore was prejudicial to the cultural and economic interests of the nation, that expressions of folklore constituting manifestations of intellectual creativity deserved to be protected in a manner inspired by the protection provided for intellectual productions, and that the protection of folklore had become indispensable as a means of promoting its further development, maintenance and dissemination.

76. Regarding implementation of the Model Provisions, several countries have used the Model Provisions as a basis for national legal regimes for the protection of folklore. Many of these countries have enacted provisions for the protection of folklore within the framework of their copyright laws.

³⁷ See particularly section 1 (5^{bis}) and section 6, Tunis Model Law.

³⁸ See WIPO/GRTKF/IC/1/13 (Report of first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore), paras. 156 to 175. See also generally Ficsor, M., op.cit.

Attemptstoestablishaninternationaltreaty,1982to1985

77. A number of participants stressed at the meeting of the Committee of Governmental Experts which adopted the Model Provisions that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned. WIPO and UNESCO followed such suggestions when they jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, which met in Paris from December 10 to 14, 1984. The Group of Experts was asked to consider the need for a specific international regulation on the international protection of expressions of folklore by intellectual property and the content of an appropriatedraft. The discussions at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, in particular, with regard to the rapidly increasing and uncontrolled use of such expressions by means of modern technology, beyond the limits of the country of the communities in which they originate.

78. However, the great majority of the participants considered it premature to establish an international treaty since there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions. Two main problems were identified by the Group of Experts: the lack of appropriate sources for the identification of the expressions of folklore to be protected and the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region. The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the report of the Group of Experts and, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a treaty for the protection of expressions of folklore was premature. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.

The adoption of the WIPO Performances and Phonograms Treaty (the WPPT), 1996

79. Folktales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances. Thus, if the protection of performers is extended to the performers of such expressions of folklore, which is the case in many countries, the performances of such expressions of folklore also enjoy protection. However, there was a slight problem in respect of the key notion of “performers” (and the notion of “performances” following indirectly from the notion of “performers”) as determined in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”). Under Article 3(a) of the Rome Convention, “performers” means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works” (emphasis added). As expressions of folklore do not correspond to the concept of literary and artistic works proper, the definition of “performers” in the Rome Convention does not seem to extend to performers who perform expressions of folklore.

80. However, the WIPO Performances and Phonograms Treaty (the WPPT), which was adopted in December 1996, provides that the definition of “performer” for purposes of the

Treaty includes the performer of an expression of folklore. ³⁹As at April 15, 2003, 41 States had ratified the WPPT. The WPPT came into force on May 20, 2002.

81. At the Diplomatic Conference at which the WPPT, as well as the WIPO Copyright Treaty (the WCT) were adopted in December 1996, the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms recommended that “provisions should be made for the organization of an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore, and the harmonization of the different regional interests.” ⁴⁰

WIPO-UNESCO World Forum on the Protection of Folklore, 1997

82. Pursuant to the recommendation made during the 1996 Diplomatic Conference, the WIPO-UNESCO World Forum on the Protection of Folklore was held in Phuket, Thailand, in April 1997. Many needs and issues related to intellectual property and folklore were discussed during this meeting. ⁴¹The meeting also adopted a “Plan of Action” which identified *inter alia* the following needs and issues:

- (a) the need for a new international standard for the legal protection of folklore; and
- (b) the importance of striking a balance between the community owning the folklore and the users of expressions of folklore.

83. In order to make progress towards addressing these needs and issues, the Plan of Action suggested *inter alia* that “(r)egional consultative fora should take place....” ⁴²

WIPO fact-finding missions, 1998 - 1999

84. During 1998 and 1999, WIPO conducted fact-finding missions to identify as far as possible the intellectual property-related needs and expectations of traditional knowledge holders (the “FFMs”). Indigenous and local communities, non-governmental organizations, governmental representatives, academics, researchers and private sector representatives were among the groups of persons consulted on these missions. For purposes of these missions, “traditional knowledge” included TCEs as a subset. ⁴³“Traditional cultural expressions” included handicrafts and other tangible cultural expressions. Much of the information obtained on these missions related either directly or indirectly to TCEs.

³⁹ For the purpose of WPPT performers who are accorded protection include “performers’ who are actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.”

⁴⁰ See BCP/CE/VI/16 -INR/CE/V/14, par. 269.

⁴¹ See WIPO Publication Number 758 (E/F/S).

⁴² The Plan of Action records that “(t)he participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with the plan of action.”

⁴³ See chapter on “Terminology” in the FFM Report.

85. The FFM were conducted in 28 countries between May 1998 and November 1999. The results of the missions have been published by WIPO in a report entitled “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)” (the “FFM Report”).⁴⁴

WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999

86. Pursuant to the suggestion included in the Plan of Action adopted at the WIPO UNESCO World Forum on the Protection of Folklore, 1997, WIPO and UNESCO organized four Regional Consultations on the Protection of Expressions of Folklore in 1999.⁴⁵ Each of the Regional Consultations adopted resolutions or recommendations which identify intellectual property needs and issues, as well as proposals for future work, related to expressions of folklore.⁴⁶ They are available from the WIPO Secretariat and on the WIPO website.⁴⁷

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

87. In late 2000, the Member States of WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the purpose of Member State discussions on these subjects. The working documents of the Intergovernmental Committee can be obtained from the Secretariat and are also available on WIPO’s website.⁴⁸

88. The Intergovernmental Committee has met four times so far. It has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns and needs of holders of traditional knowledge and custodians of traditional cultures. With the guidance of the Committee, the Secretariat has undertaken a series of detailed analytical studies, based on extensive surveys of national experience in this area, to form the basis for international policy debate, and also developed practical tools aimed at enhancing the IP interests of holders of traditional knowledge, traditional cultural expressions (TCEs) and genetic resources. The Committee’s sessions are attended by over 400 representatives from Member States, IGOs and NGOs.

89. Insofar as TCEs are concerned, the Committee has considered detailed Secretariat analysis of the use of existing IP and *sui generis* approaches for the legal protection of TCEs (documents WIPO/GRKTF/IC/3/10 and WIPO/GRTKF/IC/4/3). This analysis was based on

⁴⁴ WIPO Publication 768E/F/S. The Report is also available at <http://www.wipo.int/globalissues/tk/report/final/index>

⁴⁵ The regional consultations were held for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). The four regional consultations were attended by 63 Governments of WIPO’s Member States, 1 intergovernmental organizations, and five non-governmental organizations.

⁴⁶ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

⁴⁷ <http://www.wipo.int>

⁴⁸ <http://www.wipo.int/globalissues/igc/documents/index.html>

the national experiences of 66 Member States, surveyed through a questionnaire issued by WIPO in 2001, and a set of case studies. One of these comprises practical studies of actual cases in which indigenous Australians have sought to use IP to protect their TCEs. The latter studies are entitled “Minding Culture – Case Studies on Intellectual Property and Traditional, Cultural Expressions”⁴⁹ and they are available on WIPO’s website and as WIPO/GRTKF/IC/Study 2. In addition, WIPO has also published a study of practical experiences in India, Indonesia, and the Philippines. The Committee has received detailed briefings by New Zealand, Nigeria, Panama, the Russian Federation, Tunisia and the Secretariat of the Pacific Community on their recent legislative experiences with the legal protection of TCEs.

90. As endorsed by the Committee, WIPO is preparing a practical guide on the legal protection of TCEs and related traditional knowledge (of which this document is an early precursor), and undertaking a practical study of the relationship between intellectual property rights and customary and indigenous systems of protection. The results of the latter will be integrated into the practical guide.

IV. TRADITIONAL CULTURAL EXPRESSIONS AS ECONOMIC AND CULTURAL ASSETS

91. The preservation and protection of cultural heritage and TCEs is important to peoples everywhere, as this fundamentally concerns the protection of the world’s intangible heritage and cultures so that it may be passed down to future generations. The loss of cultural heritage is a tragedy for those peoples and communities that depend upon the integrity of their knowledge and cultural systems for their survival. Thus, a great deal of cultural heritage may have no commercial potential whatsoever but this does not make it any less worthy of respect or protection.

92. However, cultural heritage is often a source of creativity and innovation, and the adequate and appropriate protection of expressions and manifestations of traditional cultures can contribute to a traditional creator’s prosperity or a community’s economic development. These types of knowledge assets have been largely overlooked in the IP community until quite recently, and in this sense, they are traditional but new intellectual assets. Tradition-based innovations and creations, which are important parts of a community’s heritage and cultural patrimony, can also act as inputs into other markets, such as entertainment, art, tourism, architecture, and fashion.⁵⁰

93. The commercial value of TCEs in relation to cultural industries tends to be concentrated in the arts and crafts, cultural tourism, music, multi-media and publishing, architecture, and fashion. Unfortunately, very little economic data exists on the value of the contribution of TCEs to these industries. Nevertheless, here are a few examples (as with the rest of this document, Committee participants are invited to provide the WIPO Secretariat with further examples and information):

⁴⁹ Available at <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>.
⁵⁰ For example see also UNESCO *Study on International Flows of Cultural Goods*, 1980-98, Paris, 2000, <http://www.unesco.org/culture/industries/trade/html_eng/question3.shtml>.

(a) 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;⁵¹

(b) A governmental poverty alleviation program "Investing in Culture" for the Khomani San people in South Africa is revitalizing the community's craft-making and enabling the community for the first time to generate its own income from their crafts. The older community members teach their skills to the younger members, thus revitalizing traditional skills that were in danger of disappearing. Through their traditional craft-making, members of the community are experiencing a growing sense of cultural identity, social cohesion and pride in their culture. While previously they were entirely dependent on government grants, each crafts-maker now earns in the region of USD600 per year, a fortune for this impoverished community. The community is considering entering more sophisticated local and foreign markets where items can be sold for higher prices.⁵² The community is becoming interested in exploring the use of IP to protect its crafts. Trademarks and geographical indications may be particularly suitable;

(c) A South African company, Buy Africa, is helping local craftsmen and women pursue their trade over the internet, by aiding them to enter the export market and supply the world South African crafts and curios. Orders for such crafts are placed online through the aid of Buy Africa;⁵³

(d) Traditional music has in recent years captured the public's imagination, evidenced by the successful emergence of world music. Technological breakthroughs in recording techniques, the rise of the music industry and the thirst for world music, are combining to create an immense market for new, diverse sounds. Paul Simon's *Graceland*, in 1986, and *Rhythm of the Saints*, in 1990, using African and Latin American music, respectively, exposed the formidable profits available when Western musicians incorporate non-western music into their songs. *Graceland* spent 31 weeks on the *Billboard* top album list and has sold over 3.5 million copies world-wide.⁵⁴ *Rhythm of the Saints* sold 1.3 million copies in the first four weeks of its release alone.⁵⁵

⁵¹ Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, pages 116 and 135.

⁵² Information received from the Department of Sports, Arts and Culture, Northern Cape Provincial Government, South Africa.

⁵³ Matlou, Jubie "Rural arts and crafts go global" Mail and Guardian, <<http://archive.mg.co.za>>; See also <www.buyafrica.com>.

⁵⁴ Sherylle Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation," Yearbook for Traditional Knowledge Music, 1996, p.57.

⁵⁵ Idem.

V. EXAMPLES OF APPROPRIATION AND MISAPPROPRIATION

94. 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 by some States and other stakeholders.⁵⁶

(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 (then 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).⁵⁷ 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."⁵⁸ 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. In another example, the Olympic Museum in Lausanne posted three Australian Aboriginal artworks on its website, to coincide with the Sydney Olympic Games in 2000, without seeking consent of the artists and encouraged people to download the artworks as wallpaper. The act was offensive to the artists, two senior Balgo artists, whose work were important cultural works and also related to their land knowledge. The artworks were removed from the website and after certain negotiations regarding the copyright and moral rights infringements, a settlement was reached which saw the artists receive an amount of money for the infringement, a written letter of apology signed by President of the Olympic Museum Foundation, acknowledging the infringement of copyright and moral rights and apologizing for cultural harm. The apology is also reproduced on the Olympic Museum's website.⁵⁹

(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 many 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.⁶⁰ A major concern in this regard is

⁵⁶ 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. The examples given are intended to illuminate many different types of TCEs for which protection is sought. Not all States may agree that each of the TCEs should or can be provided with IP protection.

⁵⁷ See WIPO/GRTKF/IC/3/10, para. 126.

⁵⁸ "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>>

⁵⁹ See the apology online at the following web address:

<http://www.olympic.org/uk/passion/museum/home_uk.asp>

⁶⁰ 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.

that music originally recorded for ethnographic purposes is now being sampled and used in new compositions for which copyright protection is claimed. Sometimes this is done under negotiated agreements (such as popular techno artist Moby's 1999 album "Play" which sampled musicologist Alan Lomax's "Sounds of the South" CD). However, in other cases, the sampling is done without agreement. 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' dancer rhythms.⁶¹ 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", which is based upon the 1930s composition "Mbube" by the late South African composer Solomon Linda, continue to be disputed in a complex matter.⁶² Another example reported on is the European group Enigma's "Return to Innocence" hit of 1993.⁶³ A related issue is the composition by non-Indigenous persons of songs and music that are pseudo-Indigenous because they, for example, treat Indigenous subject matter, and/or are accompanied by a rhythmic pattern which is associated with Indigenous music.⁶⁴

(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 steel pan of the Caribbean region and the didgeridoo of Indigenous Australians).⁶⁵ 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.⁶⁶

(v) Indigenous peoples and traditional communities have expressed the need to be able to protect design 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 *molin* in Panama and the wari woven tapestries and textile bands from Peru; carpets (of Egypt, Oman, Iran (Islamic Republic of

⁶¹ 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.

⁶² Discussion with Dr. Owen Dean, Spoor and Fisher Attorneys, Pretoria, South Africa, October 23, 2002. See also M. Alan Rian "Where does the Lion Sleep Tonight", at <http://www.3rdearmusic.com/forum/mbube2.html> (October 23, 2002).

⁶³ See "Taiwanesesinger 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).

⁶⁴ Sandler, op. cit., pages 39 and 40.

⁶⁵ Sandler, Felicia, op. cit., pages 35 to 38.

⁶⁶ Janke, op. cit., pages 37 to 40.

and other countries); tents (such as the traditional tipi designs in North America); shoes (such as traditional moccasins designs in North America); and, counterfeit “traditional Appalachian” quilts made outside the U.S.A. and sold in discount stores for a fraction of the cost of the handmade quilts. 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.⁶⁷ The imitation of traditional textile designs causes not only economic prejudice but also threaten to destroy traditional textiles and weaving crafts. Such reproduction 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 the *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.

(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 non-traditional items such as t-shirts, tea towels, placemats, 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, recording 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 (although this is unlikely to happen with professional ethnographers bound by professional codes of ethics). 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.⁶⁸

(x) In order to pass off an item (such as an art or craft item) as “indigenous,” the style or method of manufacture of Indigenous and traditional production 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,

⁶⁷ See response of Bhutan to the folklore questionnaire.

⁶⁸ 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.

tempos, meters and so forth. ⁶⁹As 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 representatives 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 designer 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.” ⁷⁰

(xi) Sacred/secret material has been subject to unauthorized use, disclosure and reproduction, such as the sacred Coroma textiles of Bolivia ⁷¹, as well as sacred songs which can only be performed in a particular place and for a specified purpose. ⁷²In New Zealand, Maori elders have protested the filming of a Hollywood movie near Mount Taranaki, a dormant volcano regarded as god-like in Maori mythology, as it was considered sacred. ⁷³

(xii) Cultural concerns and legal questions have been raised by the commercial use of originally Indigenous words by non-Indigenous entities, such as ‘tohunga’, ‘matanui’, ‘pontiac’, ‘cherokee’, ‘billabong’, ‘tomahawk’, ‘boomerang’, ‘tairona’, ‘vastu’ ⁷⁴, ‘ayurveda’, ‘gayatri’, ‘siddhi’, ‘yoga’, and ‘rooibos.’ ⁷⁵The 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 had not done anything illegal, had acknowledged the need to take account of such cultural concerns in its future activities. ⁷⁶Representatives of Maori groups and Lego have reportedly met to discuss the development of an international self-regulating code of

⁶⁹ Sandler, op.cit., pages 46 to 48.

⁷⁰ WIPO/GRTKF/IC/1/5, Annex II, pp. 7 and 8.

⁷¹ Lobo, Susan, *The Fabric of Life: Repatriating the Sacred Coroma Textiles*, Cultural Survival Quarterly, Summer 1991, pages 40 and 41

⁷² Sandler, op.cit., pages 41 to 44.

⁷³ See “Maori elder stry toscupper Cruise movie”, Telegraph, January 15, 2003.

⁷⁴ See “War of words: Whose Vastu is it, anyway?”, Times News Network, December 28, 2002.

⁷⁵ See Silver, Bradley “Tempest brews over teatrademark”, *The National Law Journal*, October 14, 2002 at < www.nlj.com >.

⁷⁶ “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 “Maori win Lego battle,” *The Guardian*, October 31, 2001 at <<http://www.guardian.co.uk/Archive/Article/0,4273,4288446,00.html>>

conduct for toy manufacturing companies, although no code has as yet been developed. 77
Complaints have recently been made by Maori in respect of a Playstation 2 game that, Maori believe, uses Maori imagery and heritage. Moana Maniapoto, a New Zealand singer, argues that she cannot use her own name on a CD and at concert tours in Germany as the name “Moana” has been claimed as a trademark by someone who now has the exclusive right to that name in Germany.⁷⁸

VI. LEGAL ANALYSIS OF THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS BY CONVENTIONAL INTELLECTUAL PROPERTY RIGHTS AND *SUI GENERIS* MEASURES AND SYSTEMS

Introduction

95. In broad summary, there are two general approaches among States to the legal protection of TCEs. Some believe that TCEs are adequately protected by existing IP systems, and that no additional measures or systems of protection are necessary or appropriate. Others believe that the establishment of new, specific measures and/or statutory systems is necessary either to complement existing IP rights or act as a substitute for them because they are regarded as inadequate and/or inappropriate. The latter are referred to in this document as “*sui generis*” measures and systems. Among those who believe that conventional IP systems are adequate, a third approach may also be detected which supports adapted, extended or modified use of existing IP where needed to meet specific needs.

96. These lines of enquiry should be undertaken in parallel, without privileging one over the other, as several States have pointed out. The two main approaches are not necessarily mutually exclusive. A dual-track approach could be formulated as follows: it is understood that TCEs have already some of their main aspects covered by existing IP 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 TCEs could be found in a multi-faceted menu of options, using both IP and some *sui generis* options.⁷⁹ In some cases, adapted, extended or modified usage of the IP system has acted as a bridge between these two approaches. In line with this perspective, this document addresses both the existing rights and *sui generis* approaches.

97. The categories of IP analyzed are copyright; trademarks, including certification and collective marks; geographical indications; industrial designs; patents; unfair competition, including passing off; and, undisclosed information (trade secrets).

98. This analysis of conventional IP systems should be read with the “Comparative Summary of *Sui Generis* Laws for the Protection of Traditional Cultural Expressions” (WIPO/GRTKF/IC/5/INF/3).

⁷⁷ See response to Folklore Questionnaire by New Zealand, and
<<http://news.bbc.co.uk/1/hi/world/asia-pacific/1619406.stm>>

⁷⁸ See for example <<http://www.law.auckland.ac.nz/learn/legalsys/daviddocs/Class11.doc>>

⁷⁹ WIPO/GRTKF/IC/3/17, paras 179, 181, 189, 192, 194, 197 and 198.

Copyright

Traditional cultural expressions as “productions in the literary and artistic domain”

99. 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).⁸⁰ The Convention makes clear that all productions in the literary, scientific and 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.

100. Many TCEs for which protection is desired 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, basketweaving, needlework, textiles, carpets, costumes, musical instruments, architecture, sculptures, engravings, handicrafts, poetry, and designs.

101. The protection provided by copyright (the economic right 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 TCEs either through receiving royalties or through damages for infringement also meets certain needs and objectives.

Limitations on the use of copyright

102. However, does copyright adequately protect TCEs? Some States, indigenous and local communities and other stakeholders suggest that copyright law is limited in its potential for protecting TCEs.⁸¹ The following have been suggested as the limitations of copyright law:

⁸⁰ 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 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 there is a requirement to protect certain other kinds of works dealt with.

⁸¹ WIPO/GRTKF/IC/1/5 (Documents submitted by the Group of Countries of Latin America and the Caribbean (GRULAC)); WIPO/GRTKF/IC/3/11 (Documents 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.

(a) Copyright protects only original works, and many traditional literary and artistic productions are not original. Hungary, for example, stated in its response to the WIPO folklore questionnaire of 2001: "...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";⁸²

(b) 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";⁸³

(c) 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.⁸⁴ The complex of rights regulating the production of Indigenous cultural material has been described by an Indigenous artist in the Australian case *M*, Payunka, Marika and Others v Indo Furn Pty Ltd*⁸⁵ 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."⁸⁶

(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.⁸⁷

⁸² 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>>.

⁸³ WIPO/GRTKF/IC/3/11., page 3.

⁸⁴ See WIPO/GRTKF/IC/3/11, page 3; McDonald, p. 45.
⁸⁵ (1994) 30 IPR 209.

⁸⁶ At page 215, quoted in McDonald, *ibid.*

⁸⁷ McDonald, p. 46.

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 regulation this may not be permissible. The Australian case of *Yumbululv Reserve Bank of Australia*⁸⁸ is relevant here;

(d) It is argued that the fixation requirement in copyright prevents intangible and oral expressions of culture, such as tales, dances or songs, from being protected unless and until they are fixed in some form or media. Even certain “fixed” expressions may not meet the fixation requirement, such as face painting and body painting;⁸⁹

(e) 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.⁹⁰

The originality requirement

103. 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.

104. 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.⁹¹

105. 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**;

⁸⁸ (1991) 21 IPR 481.

⁸⁹ See also McDonald, p. 42 and Ellinson, Dean “Unauthorised Reproduction of Traditional Aboriginal Art,” UNSW Law Journal, 1994, p. 333.

⁹⁰ 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 Viet Nam.; WIPO/GRTKF/IC/3/11. (Documents submitted by the European Community and its Member States), page 3.

⁹¹ 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.

Payunka, Marika and Others v Indo Furn Pty Ltd,⁹² where the Court had no difficulty in holding that the art works before it were original:

“Although the art works follow traditional Aboriginal form and are based on dreaming themes, each art work is one of intricate detail and complexity reflecting great skill and originality.”⁹³

106. Although the relevant Australian cases all concerned the visual arts, there seem 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.’

107. Therefore, at least insofar as common law jurisdictions are concerned, contemporary tradition-based TCEs are sufficiently original to be protected as copyright works provided that some new expression, beyond merely reproducing the traditional form or expression, is added.

108. The law makes no distinction based on the identity of the author, i.e., -the originality requirement could be met even by an author of a contemporary expression of folklore who is not a member of the relevant cultural community in which the tradition originated. This may trouble Indigenous, traditional and other cultural communities, whomay wish to deny or at least restrict the ability of persons not from the relevant cultural community from enjoying copyright in creations derived from that cultural community. This raises some serious policy questions relating to cultural exchange, cultural diversity and other cultural and intellectual policy objectives. It may be preferable to develop means of placing upon such a person certain obligations toward 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).

109. 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 WIPO’s TCE questionnaire of 2001, 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 ‘folktale’ had created an individual and original work. The Court held that as regards folktales, originality and authorship must be judged taking into account the special rules of folk poetry. In this respect, first of all the variability of folktales is important: folktales 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.”

⁹² (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>.

⁹³ (1994) 30 IPR 209 at p. 216.

110. Similarly, Kuttu reports on a case in Indonesia involving a decorated wooden mask of Indonesian dancers, a folk creation, being manufactured and marketed in a foreign market for commercial gain. In fact, two different commercial groups indulged in the marketing of the 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.⁹⁴

111. As noted earlier, whether or not States wish to provide some form of protection for this public domain material is first and foremost a policy question.

112. If a State wishes to do so, it could look at how existing *suigeneris* systems have dealt with the originality issue. Generally, these *suigeneris* systems are not conceived as part of copyright *strictus 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

113. Copyright does not only protect individual creators. Copyright can protect groups of creators as joint authors or employees. In fact, today, it is quite common for more than one person to create a single copyright work. However, in each case it is necessary that the creator or creators be identifiable. Where more than one author contributes original expression with the intention of merging their contributions into a unitary whole, they may be deemed “joint authors” in many jurisdictions and each is considered a copyright owner. In other cases, where there are separable works combined in a single production, each of the different creators may hold a separable copyright in their contribution. Different forms or rights of copyright, owned by different parties, can inhere in the one production. In each of these cases, the individual authors retain their own copyright, unless the authors affirmatively assign them to another legally organized entity or person (which, in the case of TCEs, could be an association, company, trust or other legal entity representing a tribe or relevant cultural community). In jurisdictions in which copyright inure to the employer, if the individuals contributing the work are employees working within the scope of their employment, the employer will hold the copyright in the first instance instead of the individuals. Accordingly, to the extent that a legal entity representing the relevant social community employed the authors, that legal entity (association, trust or the like) would be the copyright owner.

114. In respect of contemporary tradition-based 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

⁹⁴ Kuttu, P. V., “Study on the Protection of Expressions of Folklore,” study prepared for the World Intellectual Property Organization (WIPO). Available at <http://www.wipo.int/globalissues/cultural/index.html>

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.”

115. These means for dealing with the identifiable author requirement presuppose the existence of an “author”, however. Although one could argue that some pre-existing TCEs must have had an ‘author’ at some stage, it is likely that for most pre-existing TCEs, there was and is no ‘author’ in the copyright sense. In the case therefore of pre-existing TCEs, one is not generally dealing with truly anonymous works, in the sense that there is an author 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 Article 15.4 of the Berne Convention for protection of works where the identity of the author is unknown.

116. 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 general IP law context may be possible, as existing *suigeneris* systems suggest:

(a) The 1982 Model Provisions recognize the possibility of collective or community rights. Being a *suigeneris* 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 the right to be an identifiable “author” or “authors”;

(b) Similarly, the Tunis Model Law on Copyright, insofar 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);

(c) The Panamala 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”;

(d) 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 IP that may subsist in the expressions of culture.

117. 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 soon. It is here that collective management may be able to play a role.

Different conceptions of “ownership”

118. 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 IP confers 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 systems.⁹⁵

119. 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.”⁹⁶

120. It was directly addressed in one of the cases Australia referred to in its response to the WIPO questionnaire of 2001, *John Bulun Bulun v Rand T Textiles*.⁹⁷ 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 clans as beneficiaries.”⁹⁸

⁹⁵ See Janke, *op.cit.*, page 44.

⁹⁶ At page 492.

⁹⁷ (1998) 4 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>.

⁹⁸ Golvan “Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments”, *E.I.P.R.*, 1999, p. 602.

121. 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 *suigeneris* systems. The laws of Panama and the Indigenous Peoples Rights Act (Republic Act No. 8371) of October 1997 of the Philippines make direct reference to customary law.

122. 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.⁹⁹

123. 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 right holder the positive entitlement to exercise rights; rather, it enables the right holder to prevent others from exercising the rights (or to authorize them to do so). Whether or not a right holder 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.”

124. 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 obligate traditional artists to act contrary to his or her customary responsibilities.

125. 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 TCEs and related traditional knowledge.

The fixation requirement

126. 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

⁹⁹ Dutfield, “Protecting Traditional Knowledge and Folklore,” draft, (UNCTAD/ICTSD), page 14.

productions protect ed 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.

127. 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.

128. Thus, a mandatory international 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 or the South Pacific Model Law. In any event, where the fixation requirement exists, it poses a problem only for intangible expressions of folklore. On the other hand, without fixation in some form, there may be a greater danger that TCEs might be copied by others (however, it is argued elsewhere in this document that the mere documentation of TCEs may not be appropriate as an IP strategy aimed at vesting copyright in the TCEs).

Limited term

129. 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.

130. Indefinite protection is not a new concept in IP law,¹⁰⁰ 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 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.

¹⁰⁰ 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.

Concerns that copyright fail to provide defensive protection

131. 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 earlier).

(a) While the copyright system treats expressions of folklore as part of the public domain, non-Indigenous and non-traditional persons (as well as Indigenous and traditional persons) are able to acquire copyright over “new” folkloric expressions so folkloric expressions incorporated in derivative works, such as adaptations and arrangements of music;

(b) Even in respect of those contemporary, tradition-based TCEs that are subject to copyright protection, the exception 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.¹⁰¹ 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. On the other hand, why should contemporary, tradition-based TCEs that are protected by copyright not be subject to the same limitations and exceptions as other copyright works;

(c) Copyright protection does generally not extend to “style” or method of manufacture, yet the method of manufacture and “style” of traditional products are vulnerable to imitation;¹⁰²

(d) 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.

132. 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.

133. Insofar as “style” and method of manufacture go, copyright protection does not extend to utilitarian aspects, concepts, formulae or other non-original elements, 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

¹⁰¹ McDonald, I., *Protecting Indigenous Intellectual Property* (Australian Copyright Council, Sydney, 1997, 1998), p.44.

¹⁰² WIPO/GRTKF/IC/1/5, Annex II, pp. 7 and 8.

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 non-original elements or underlying ideas and concepts of works, which is a widespread practice as creativity is nourished and inspired by other works. The U.S.A. has pointed out in its comments on WIPO/GRTKF/IC/4/3, that under U.S. law elements of style may be protected to the extent that a style incorporates original expression.

134. Therefore, even if copyright were to vest in a new tradition-based cultural expression, copyright protection would not *per se* prevent the traditional “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 may relate to protection of a style *per se*, as an object of protection, or to protection of a misleading connotation or representation that is based on the use of a style or distinctive imagery or symbols. This is discussed in more detail below (see from paragraph 202).

135. These types of questions could also be addressed in *suigeneris* 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.

136. 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.

Conclusions

137. 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, tradition-based cultural expressions), whether or not made by Indigenous and traditional persons. The fixation requirement, insofar as it exists in certain national laws, prevents however the protection of intangible contemporary cultural expressions (such as music, dance and rituals) unless and until they are fixed in some form or medium.

138. So, as a conclusion, it may be stated that copyright protection is available for tangible, contemporary tradition-based TCEs. Cases in Australia and Canada are examples of this. In addition, intangible expressions are also protected in countries not requiring fixation unless and until they are fixed. Such copyright would vest in the author or authors of the new work, who would generally be identifiable.

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¹⁰³ The Australian cases are discussed above and described in the WIPO “Minding Culture” case studies. In Canada, the Copyright Act has been used by a range of Aboriginal artists, composers and writers to protect their tradition-based creations. Examples include woodcarvings of Pacific coast artists, silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists, and sculptures of Inuit artists.

139. 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.

140. Therefore, while copyright protection is possible in certain cases, it may not meet all the needs and objectives of Indigenous peoples and traditional communities.

141. 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. 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.

142. Insofar 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.

143. 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 *suigeneris* systems, as some have already done.

144. 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 *suigeneris* system may be necessary in order to protect pre-existing folklore. As the U.S.A. points out in its comment on WIPO/GRTKF/IC/4/3, "it is virtually impossible to provide 'full' protection for TCEs simply by amending copyright laws, as copyright law by its nature is not appropriate to protect TCEs. Copyright law protects only original expressions, leaving works that have become an intrinsic part of our history and culture to the public domain."

Performers' Rights

145. The examples of TCEs that Indigenous peoples and traditional communities wish protection for include traditional performances, such as dances and plays.

146. Performers' rights, as recognized in the 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 April 15, 2003, 41 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.

147. It has often been suggested that the protection of performances of expressions of folklore might, in directly, 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.

148. 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 this section below on “Collection, recording 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 insofar as expressions of folklore are concerned. Work continues on the development of an instrument for the protection of audiovisual performances.

Trademarks, including certification and collective marks

Introduction

149. Trademarks are signs used to distinguish the goods and services of one business from that of another in the marketplace. Such signs may consist of, among others, words, drawings, 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 earlier, 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. In distinguishing the various forms of protection that may be applied to TK/TCE subject matter, document WIPO/GRTKF/IC/5/12 noted (in paragraph 44) that: “protection can also potentially apply to misleading or deceptive use of TK or TCE material or any related signs or symbols, and any use that falsely suggested an association with or endorsement by an Indigenous or local community. This suggests that laws or specific IP rights may be developed that define or give notice of the distinctive reputation, signs and symbols of traditional communities and Indigenous cultures (for instance, authenticity labels and certification marks, and prohibitions on the use of certain terms and symbols).”

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

150. 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.¹⁰⁴ But, a trademark serves to indicate the commercial origin of products and to distinguish one

¹⁰⁴ Sandler, F. “Music of the Village in the Global Marketplace: Self-Expression, Inspiration, Appropriation, or Exploitation?” p.39.

product from 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 product 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 other soft their symbols, words and soon as trademarks, Indigenous peoples and traditional communities become associated with products that may be inferior, stereotyped or associated with a certain lifestyle.¹⁰⁵

151. 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.¹⁰⁶ 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

152. Certain regional organizations and States have already taken steps to prevent as far as possible the unauthorized registration of Indigenous marks as trademarks (these seek to achieve one of the forms of what was referred to as a “defensive protection” earlier in this document.) Three examples are the Andean Community, the United States of America and New Zealand:

(a) Article 136(g) of Decision 486 of the Commission of the Andean Community provides that “signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their culture or practice, except where the application is filed by the community itself for with its express consent.” In Colombia, a case has been presented in which the mark has been rejected as a result of the exception mentioned above. The case concerned an application for registration of a mark of the expression “Tairona”, which coincides with an indigenous culture that inhabited Colombian territory. It was decided that the expression “Tairona” was protected as part of the culture’s heritage and of the country as such. In that regard, only representatives of this culture or persons with the authorization of those representatives would be entitled to request consent to use the expression as a distinctive sign and, in this particular case, as a mark; as

(b) 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.¹⁰⁷ Under Section 2(a) of the Trademark Act, 1946, as amended, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring

¹⁰⁵ Cassidy, Michael (ed.) “Intellectual Property and Aboriginal People: A Working Paper,” p.22.

¹⁰⁶ WIPO/GRTKF/IC/3/10, par. 122(i).

¹⁰⁷ See “Report on the Official Insignia of Native American Tribes,” September 30, 1999.

them into contempt, or disrepute. The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. Such provision provides not only protection for folklore aspects of Native American tribes, but also “those of other indigenous peoples worldwide.” The Trademark Law Treaty Implementation Act, 1998 required the USPTO to complete a study on the protection of the official insignia of federally and state-recognized Native American tribes. As a direct result of this study,¹⁰⁸ on August 31, 2001 the USPTO established a Database of Official Insignia of Native American Tribes. The Database of Official Insignia of Native American Tribes may be searched and thus prevent the registration of a mark confusingly similar to an official insignia. “Insignia” refers to “the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe” and does not include words;¹⁰⁹

(c) In New Zealand, the Trade Marks Act now contains a provision which allows 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 this section which lists grounds for not registering trademarks the Act states:

“(1) The Commissioner must not do any of the following things:

(b) register a trademark or part of a trademark if –

(i) the Commissioner considers that its use or registration would be likely to offend a significant section of the community, including Maori”¹¹⁰

Opposition and cancellation procedures

153. 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 cancellation 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 goods 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.

154. 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 cancel a registered mark. Janke, in her study for WIPO on “The Use of Trademarks to Protect Traditional Cultural Expressions,”¹¹¹ 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

¹⁰⁸ Available at < <http://www.uspto.gov/web/menu/current.html>> (30 Nov 99 entry).

¹⁰⁹ *Ibid.*, pp. 24-26.

¹¹⁰ The Act is available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/049.html>

¹¹¹ At < <http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>.

Indigenous peoples on how opposition and cancellation and/or invalidation proceedings work.¹¹²

Registration of trademarks by Indigenous peoples and traditional communities

155. In their responses to the WIPO questionnaire of 2001, States gave several examples of uses of trademarks by Indigenous peoples and traditional communities, such as the Indigenous Label of Authenticity in Australia.¹¹³ These are examples of the positive assertion of IP rights over TCEs, as referred to earlier in this document.

156. For example, in Canada, trademarks, including certification marks, are often used by Aboriginal people to identify a wider range of traditional goods and services. These range from traditional art and artwork to food products, clothing, tourist services and enterprises run by First Nations. Many Aboriginal businesses and organizations have registered trademarks relating to traditional symbols and names. The number of unregistered trademarks used by Aboriginal businesses and organizations is considerably greater than those that are registered. Some trademarks are registered in order to prevent improper utilization of symbols or names. Further, the Snuneymuxw First Nation of Canada in 1999 used the Trademarks Act to protect ten petroglyph (ancient rock painting images). Because the petroglyph has special religious significance to the members of the First Nation, the unauthorized reproduction and commodification of the images was considered to be contrary to the cultural interests of the community, and the petroglyph images were registered in order to stop the sale of commercial items, such as T-shirts, jewelry and postcards, which bore those images. Members of the Snuneymuxw First Nations subsequently indicated that local merchants and commercial artisans had indeed stopped using the petroglyph images, and that the use of trademark protection, accompanied by an education campaign to make others aware of the significance of the petroglyph to the Snuneymuxw First Nation, had been very successful.

157. Another example is provided by Mexico. The creations of the Seri people include numerous articles of adornment for craft markets and they constitute an important source of income for families and communities. In the middle of 1993, a meeting was held to discuss the difficult circumstances of the Seri craftsmen who produced iron wood pieces but were faced with mass production by mestizo workers. In view of the fact that not just one process and one product were involved, the appellation of origin concept was eventually not adopted, and the trademark route was taken instead. In order to secure protection for a wider range of Seri products (baskets, necklaces, carvings in wood and stone, dolls, etc.), the Cooperative Consumer Society "Artesanos Los Seris" S.C.L. registered the trademark Arte Seri with the Mexican National Institute of Industrial Property in five different classes between 1994 and 1995. Although the trademark is still in force in the various categories, the Seri are not making use of it. This case provides several interesting lessons and could form the subject of a more in-depth study for purposes of the "WIPO Practical Guide" on traditional cultural expressions and related traditional knowledge.

158. In Portugal, Arraiolos carpets, North Alentejo handicraft, striped cheese and Minho fiancées' handkerchiefs are registered as collective marks as well as shoes from

¹¹² Pages 9 and 10.

¹¹³ 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>>

Portugal, Caldas da Rainha embroidery, Açores pineapple, cheese of Évora, Açores handicraft.

159. In New Zealand, the Maori Arts Board, *Te Waka Toi*, is making use of trademark protection through the development of the *Toi Iho*™ Maori Made Mark.¹¹⁴ The mark is a certification trademark denoting authenticity and quality as it indicates to consumers that the creator of goods is of Maori descent and produces work of a particular quality.¹¹⁵ 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, 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 “copycat” products.¹¹⁶ 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.¹¹⁷ This form of trademark provides protection for the reputation associated with the TCE (in essence, providing assurance that the TCE is applied to is legitimate), rather than a direct form of protection for the TCE itself, unlike the Snuneymuxw petroglyphs cited above, in which case the TCE is itself the direct subject of protection. e

160. Indigenous and traditional peoples have, despite these examples, raised concerns that the trademark system does not meet their needs. 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.

161. Yet Janke¹¹⁸ 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.

162. 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

¹¹⁴ For more information on the *Toi Iho*™ Mark see < <http://www.toiio.com> >

¹¹⁵ 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.

¹¹⁶ See response to Folklore Questionnaire by New Zealand.

¹¹⁷ <<http://www.toiio.com/about/about.htm>>

¹¹⁸ At <http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>

other natural resource products, arts centres, clothing and textiles, music, film and broadcasting and publications and Internet -related services.

163. 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 trademark laws in an effort to register their own trademarks for the protection of their artistic works and other Indigenous knowledge, particularly proposed Indigenous commercial use. In most cases, the trademarks have not proceeded to registration. It is hypothesized that this is because often the proposed trademark 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 trademarks used by Aboriginal businesses and organizations is considerably greater than those that are registered... Although, there is strong evidence that Indigenous use of the trademark system is increasing, it would appear that Indigenous people need to know much more about the system, namely how to apply and overcome the opacity of marks and other issues raised in adverse reports....”¹¹⁹

Conclusions

164. At this stage, 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.

165. 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.

166. 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.

Geographical indications

167. Geographical indications are potentially useful in this area as a number of participants in the Committee’s work have pointed out.

168. The term “geographical indications” is defined in Article 22.1 of the TRIPS Agreement as an indication which identifies a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.¹²⁰ In respect of geographical

¹¹⁹ Page 22.

¹²⁰ In this sense, “geographical indication” encompasses the term “appellation of origin” as defined by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1979 and as referred to in the Paris Convention. Another subject of IP protection

indications, States must, according to Article 22.2 of the TRIPS Agreement, provide legal means for “interested parties” to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good originates in a geographical area other than its true place of origin in a manner that misleads the public and any use which constitutes an act of unfair competition within the meaning of Article 10 *bis* of the Paris Convention. Under Article 22.3, States may refuse or invalidate the registration of trademarks which contain or consist of a geographical indication with respect to goods not originating in the territory indicated, if such use of the indication would mislead the public.

169. Some TCEs, such as handicrafts made using natural resources, may qualify as “goods” which could be protected by geographical indications. In addition, some TCEs may themselves be geographical indications, such as indigenous and traditional names, signs and other indications.

170. Some States have provided relevant examples of the registration of geographical indications with respect to TCEs and related traditional knowledge:

(a) Portugal referred to the wines of Porto, Madeira, Redondo, Dão; the cheeses of Serpa, Azeitão, S. Jorge, Serrada Estrela, Nisa; Madeira embroidery; and, honey of Alentejo, Açores;

(b) In Mexico, the appellation of origin OLINALÁ relates to wooden articles made in the municipality of Olinalá in the state of Guerrero. This tradition has to do with Mexican lacquers which use natural raw materials, and the product is clearly an example of the connection between the environment and culture, which makes it eligible for the appellation. The applicant for recognition of the denomination was the Unión de Artesanos Olinca, A.C., although in fact the declaration was made by, and the appellation belongs to, the State as a whole, which rules out the possibility of the arbitrary exclusion of other interested parties. That fact indicates the importance of appellations of origin as elements of the national heritage which should be protected by the State. The articles in question are chests and crates made of wood from the Alo tree (*Bursera aeloxylon*), a tree endemic to the Upper Balsas region. The lacquering process involves additional raw materials such as fat of insect origin and mineral powders. The manufacture of Olinalá craft products is a local tradition that makes use of wood from a shrub that is a biological resource specific to the region. A further Mexican example is the TEQUILA appellation of origin. Tequila is a spirit produced in various regions of Mexico by distillation of the fermented must derived from the heart of a plant known as the “blue agave,” the “Azul” variety of the *Agave tequilana* Weber. The name Tequila comes from the eponymous region in Jalisco, but the traditional production takes place in a number of municipalities in the states of Jalisco, Nayarit, Tamaulipas, Guanajuato and Michoacán. The making of tequila involves knowledge that is traditional in the region

is an “indication of source”, which is also referred to in the Paris Convention, and which refers to any expression or sign used to indicate that a product or service originates in a country, region, or specific place. The difference, it follows, between “geographical indication” as used in the TRIPS Agreement and “appellation of origin” as used in the Paris Convention, on the one hand, and “indication of source”, is that the former requires a quality link between the product and its area of production, the latter not. The term “geographical indication” is often used to refer to both appellations of origin and indications of source. In order to take into account all existing forms of protection, this document uses the term “geographical indication” in its widest possible meaning.

and dates back to the middle of the sixteenth century, and it evolved into a full -scale industry at the end of the nineteenth. Tequila is considered the Mexican alcoholic beverage *par excellence*;

(c) In the Russian Federation, a number of ancient industries are registered, the articles for which are connected with designations claiming to protect as appellations of origin: Velikiy -Ustyugniello, Gorodets painting, Rostov enamel, Kargopol claytoy, and a Filimonov toy.

Industrial designs

171. Industrial design law protects the external appearance of independently created functional items that are new or original.¹²¹ Design rights can be based on creation or on registration, and confer exclusive rights to the owner of the design. The duration of protection available for design rights shall amount to at least 10 years. In some jurisdictions this period may even be longer.¹²² 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.¹²³

172. There are several examples of traditional cultural expressions 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.

173. As shown by the fact -finding and subsequent activities of WIPO, Indigenous peoples and traditional communities claim that under current design 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...”¹²⁴ 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.

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

Positive protection of traditional designs

175. For a design to be protected as an industrial design it needs to be “new or original.”¹²⁵ Although there is no established definition of the notion “new” in international treaties, it generally means that no identical or very similar design has been made available to the public

¹²¹ Article 25.1 of TRIPS Agreement of 1994.

¹²² Article 26.3 of TRIPS Agreement of 1994.

¹²³ Article 26.1 of TRIPS Agreement of 1994.

¹²⁴ See Documents submitted by GRULAC “Traditional Knowledge and the Need to Give it Adequate Intellectual Property Protection” (WIPO/GRTKF/IC/1/5), Annex I, par. 6.

¹²⁵ Article 25.1 of TRIPS Agreement of 1994.

before the registration or priority date. “Originality” generally means that a design does not significantly differ from known designs or combinations of known design features.¹²⁶

176. 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:

(a) During a fact-finding mission to China conducted by WIPO in December 2002, the WIPO delegation met a designer who had obtained design protection in China for his traditionally-inspired but otherwise original tea sets;

(b) In Kazakhstan, industrial design protection has been granted to the outward appearance of national outer clothes, headresses (*sakyele*), carpets (*tuskiiz*), decorations of saddles, and women’s decorations in form of bracelets (*blezik*).¹²⁷ Industrial design protection is found in that country’s patent law,¹²⁸ which defines an industrial design as “an artistic and technical solution defining the outward appearance of a manufactured article.”¹²⁹ The law states additionally that for an industrial design to be protectible, it has to be new, original and deemed industrially applicable.¹³⁰ The description of ‘new’ in the law provides: “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.”¹³¹

177. Further such examples may be needed before being able to draw any conclusions. However, it is suggested that while contemporary forms of traditional designs may meet the “novelty” 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

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

(a) 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, is going to be publicly disclosed anyway, and registrations simply provide the necessary protection (it should be noted, however, that protection under design law is generally only afforded to a design which is new or original, so that if a design has already been publicly disclosed it may not be eligible for protection);

¹²⁶ Article 25.1 of TRIPS Agreement of 1994.

¹²⁷ See Report on National Experiences (WIPO/GRTKF/IC/3/10), par. 126.

¹²⁸ See Patent Law of the Republic of Kazakhstan, No. 428 –ILRK, July 16, 1999, available at <http://www.kazpatent.org/english/acts/patent_law.html>

¹²⁹ Article 8(1) of Patent Law of Kazakhstan.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

(b) 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;

(c) 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 the 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);

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

Facilitating use of industrial design law

179. 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.

180. 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.”¹³²

181. A practical suggestion is that it may be important for 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. See further below in section on “Cultural Heritage Collections, Databases and Registries.”

Defensive protection

182. As noted earlier, it is often the appropriation of the “style” of traditional design that is complained of. This question is also discussed in the section above on “Copyright” and the points made there are relevant to trademarks. The use of unfair competition law and the law of passing off is also relevant and is discussed from paragraph 202 below.

183. Another way in which expressions of folklore can be protected defensively could be through the process of documentation. This is discussed further in the section “Cultural Heritage Collections, Databases and Registers” below.

¹³² Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994, Section 4, Article 25(2).

Sui generis protection of designs

184. It can be noted that existing *sui generis* systems covers a lot of traditional designs, and they will be discussed more fully in the Practical Guide. In brief:

(a) the Model Provisions, 1982 provide for the protection of designs as tangible expressions of folklore¹³³ against their unauthorized reproduction or use;

(b) Panama's *sui generis* law, "Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity as their Traditional Knowledge,"¹³⁴ makes explicit reference to traditional textile and dress designs. Also relevant would be the "Provisions on the Protection, Promotion and Development of Handicraft."¹³⁵ 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.¹³⁶

Conclusions

185. The requirement of "novelty" 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 "novelty" or "originality" requirement than would truly old and well-known designs. Further empirical information would be helpful.

186. 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.

187. 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 below.

Patents

188. Patents of invention are also relevant to the protection of traditional cultural expressions. For example, patents may relate to the traditional methods of producing TCEs, and the grant of a patent right may be seen as impacting on the interests of traditional communities. This raises a host of practical and legal questions which are addressed (with a focus on TK and genetic resources subject matter) in documents WIPO/GRTKF/IC/5/5 and

¹³³ See Section 2 of the Model Provisions

¹³⁴ 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).

¹³⁵ Panama Law No. 27 of July 24, 1997.

¹³⁶ See response of Panama to Folklore Questionnaire at
<<http://www.wipo.org/globalissues/questionnaires/ic-2-7/panama.pdf>>

WIPO/GRTKF/IC/5/6. One example with bearing on the production of TCEs was a patent obtained in respect of a process for formation of the Caribbean steel pan musical instrument has raised objections from persons in the Caribbean.¹³⁷ In the event that Caribbean nationals or an appropriate Caribbean entity had previously acquired patent rights in respect of the same or similar claims, they could have, through the positive assertion of those rights, prevented others from acquiring the patent rights. To the extent that a defensive interest was present within the Caribbean, the documentation of traditional processes for making the instrument and its publication as part of the prior art, could have been undertaken as an IP strategy.

189. In the Russian Federation, patents have been granted to national industrial enterprises for inter alia “Porcelain glaze” (Patent no. 2148570; Applicant: “Gzhel” Association) and a “Method for artistic -decorative articles made of wood (variants)” (Patent no. 2156783; Applicant: “Khokhloma Painting” Association.)

Unfair competition (including passing off)

190. As already noted, unfair competition law may respond to many of the needs expressed by indigenous and traditional communities. This was identified by GRULAC in WO/GA/26/9, and the Delegation of Norway has raised the question:

“whether it would be possible to provide protection for TK along similar lines, using Article 10 bis as a model when considering the framework of a sui generis system for TK. The idea, they said, would then be to have a general international norm that obliged the States to offer protection against unfair exploitation of TK. Such a general norm could be supplied with internationally agreed guidelines on how to apply the norm. One aspect of such an angle to the problem would be that TK would be protected as such without any requirements of prior examination or registration, and judicial decisions in concrete cases on whether there had been an infringement of the TK protection, would be taken on the basis of a flexible norm referring to fairness and equity. The Delegation indicated that such internationally agreed guidelines would favorably assist national judges when applying such a norm.”¹³⁸

d

191. Article 10 *bis* of the Paris Convention provides that any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. The following in particular are prohibited:

- (a) acts which may cause confusion with the products or services, or the industrial or commercial activities, of a competitor;
- (b) false allegations which may discredit the products or services, or the industrial or commercial activities, of a competitor;
- (c) indications or allegations which may mislead the public, in particular as to the manufacturing process of a product or as to the quality, quantity or other characteristics of products or services.

192. In addition to these “particular cases” certain other acts have been recognized as possibly constituting acts of unfair competition. These include violation of trade secrets and

¹³⁷ See “A Nation’s Steel Soul,” New York Times, July 7, 2002, at <http://www.nytimes.com/2002/07/07/weekinreview/07BARA.html>

¹³⁸ Document WIPO/GRTKF/IC/3/17, paragraph 227.

taking undue advantage of another's achievement ("freeriding"). Article 10 *bis* of the Paris Convention has been incorporated into the TRIPS Agreement.¹³⁹

193. Unfair competition laws supplement industrial property laws or grants a type of protection that no such law can provide. Therefore, to fulfill these functions, unfair competition law must be flexible and independent of any formality such as registration. In particular, unfair competition law must be able to adapt to new forms of market behavior. Such flexibility does not necessarily entail a lack of predictability.

194. A recent case in Australia is illustrative. In April 2003, the Australian Competition and Consumer Commission obtained interim orders in the Federal Court, Brisbane restraining Australian Icon Products Pty Ltd until trial from describing or referring to its range of hand painted or hand carved Indigenous oriented souvenirs as "Aboriginal art" or "Authentic" unless it reasonably believes that the artwork or souvenir was painted or carved by a person of Aboriginal descent. The orders, which were by consent, included an order requiring Australian Icon to send a letter to its retail customers and to post that letter on its website correcting those representations. One of Australia's largest manufacturers of Aboriginal-style souvenirs, Australian Icon claims to supply over 1700 retailers nationally and export to 38 countries around the world. The ACCC instituted proceedings alleging that Australian Icon represented that some of its hand painted Aboriginal-style souvenirs were "authentic", "certified authentic" and/or "Australian Aboriginal art". The ACCC alleges that these representations were likely to mislead because the majority of Australian Icon's pool of artists who produced the souvenirs were not Aboriginal or of Aboriginal descent. It is further alleged that a statement by Australian Icon on its website that the pool of artists who paint these souvenirs are "Australian, Aboriginal by descent or Aboriginal" is in itself misleading. The ACCC's allegations do not apply to souvenirs that Australian Icon purchases or produces as final products from Indigenous artists. The ACCC is also seeking final orders that include:

- (a) a declaration that the alleged conduct breaches the misleading or deceptive conduct;
- (b) permanent injunctions restraining Australian Icon from engaging in similar conduct in the future;
- (c) further corrective notices to be sent to retailers and displayed on Australian Icon's website;
- (d) a community service order requiring Australian Icon to supply public notices to retailers alerting customers that they should read the labels carefully as they should not assume products featuring Aboriginal designs are designed or made by Aboriginal people unless the label clearly says so; and,
- (e) the implementation of a trade practices compliance program.¹⁴⁰

Undisclosed information (trade secret law)

195. Article 39 of the TRIPS Agreement provides that in the course of protecting against unfair competition under Article 10 *bis* of the Paris Convention, members of the World Trade Organization must protect "undisclosed information", as defined in the Article, against unlawful acquisition, disclosure or use in a manner contrary to honest commercial practices.

¹³⁹ Article 2.1, TRIPS Agreement.

¹⁴⁰ See < <http://www.accc.gov.au/>> (April 7, 2003).

196. In the Australian case of *Foster v Mountford* (1976) 29 FLR 233 the common law doctrine of confidential information was used to prevent the publication of a book containing culturally sensitive information. The case concerned an anthropologist, Dr. Mountford, who undertook an expedition to the Northern Territory outback in 1940. Local Aboriginal people revealed to him tribal sites and objects possessing deep religious and cultural significance for them. The defendant recorded this information some of which he published in a book in 1976. The plaintiff successfully sought an interlocutory injunction restraining the publication of the book on the basis of breach of confidence. (The plaintiff could not bring an action for copyright infringement because the work in question, the book, had not been written by them and they had not acquired the copyright in it). The Court held that the publication of the book could disclose information of deep religious and cultural significance to the Aborigines that had been supplied to the defendant in confidence and the revelation of such information amounted to a breach of confidence.

VII. THE MODEL PROVISIONS FOR NATIONAL LAWS, 1982

197. In 2001, WIPO published a questionnaire of national experiences with implementation of the Model Provisions, and found that many countries have used them to some or other degree in establishing their legislation. Examples from among the questionnaire respondents are Burkina Faso, Ghana, Kenya, Namibia, Mozambique, Mexico, Senegal, Sri Lanka, Togo, the United Republic of Tanzania, and Viet Nam.

198. However, it appears that there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice. There appear to be little practical experience with their implementation.

199. It is unfortunately not possible to identify any single reason for this as there are a variety of legal, conceptual, infrastructural and other operational difficulties experienced by States in establishing and implementing workable and effective legislative provisions at the national level. The needs in this regard are diverse, and there are no single solutions or approaches.

200. These conclusions strongly suggest, first, the need for the strengthening and more effective implementation, at the national level, of existing systems and measures, such as the Model Provisions, for the protection of TCEs, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries. Comprehensive and integrated legal-technical cooperation is needed, utilizing, where appropriate, the full breadth of the intellectual property system and other existing and available measures, and taking into account States' respective international intellectual property obligations. The success of such assistance would depend upon the full and committed involvement of national governments. The need for inter-ministerial approaches is made clear by the diversity of Ministries, departments, agencies and offices with jurisdiction over the protection of TCEs. The affected peoples and communities, and other stakeholders, such as the local legal profession, should also be consulted and involved where appropriate. See further "Acquisition, Management and Enforcement of Rights" in Section X below.

201. The Committee has approved the provision by the WIPO Secretariat, upon request and on a project basis, of enhanced intellectual property legal-technical cooperation to States, their

peoples and communities and, where relevant, regional organizations, in regard to the strengthening and more effective implementation of existing systems and measures for the protection of TCEs. Document WIPO/GRTKF/IC/5/4 is a brief report to the Committee on such cooperation. In its comments on the previous version of this document, the Philippines also agreed with these conclusions and the above approach to enhanced legal -technical cooperation.

202. Second, the results of the WIPO questionnaire, as well as previous WIPO activities, disclosed several suggestions for the updating and modification of the Model Provisions, or, as some put it, the development of new non -binding model provisions, guidelines or recommendations in this area.¹⁴¹

203. It has been argued that model provisions, guidelines or recommendations could greatly assist national offices and institutions attempting to establish effective systems of protection, as well as provide coherence to emerging national and regional systems that are otherwise developing in diverse directions.

204. In general terms, it has been suggested that new model provisions, guidelines or recommendations for national laws should be developed in order to take into account changes to the legal, policy and technological contexts since the late 1970s and early 1980s when the Model Provisions were developed. These changes include: greater awareness of the range of rights and needs of indigenous and traditional peoples; growing understanding of the relationship between cultural heritage preservation, the promotion of cultural diversity and IP; the emergence of new cultural instruments addressing cultural heritage and diversity; changes to the IP landscape particularly in the form of the TRIPS Agreement, 1994 and the WPPT, 1996; and, technological developments and new forms of commercial exploitation that have arisen since the early 1980's.

205. More specifically, certain more fundamental and conceptual limitations of the Model Provisions have been pointed to. Earlier in this document and in WIPO/GRTKF/IC/4/3 it was pointed out that they provide a form of "blanket" protection for public domain TCEs, although there is a wide "borrowing" exception. It appears therefore that there is no protection against the making of derivative works based on public domain TCEs. On the other hand, the Model Provisions provide no form of defensive protection for specific TCEs that cultural communities have deemed worthy of protection through prior registration. It may therefore be that new model provisions in the form of guidelines or recommendations could address these and other issues.

¹⁴¹ See Statements of States at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/ IC/1/13, WIPO/GRTKF/IC/2/16), and Responses to Questionnaire (for example, Burundi; Chad; Côte d'Ivoire; Colombia; Ecuador; Iran (Islamic Republic of); Jamaica; Kyrgyzstan; Malaysia; Mexico; Namibia; New Zealand; Pakistan; Panama; Philippines ; Poland; Romania; Sri Lanka; Togo; Tunisia; Venezuela; Viet Nam and, the African Group). See also WIPO - UNESCO Regional Consultation on the Protection of Expressions of Folklore for countries of Asia and the Pacific, Hanoi, April 21 to 23, 1999 (WIPO - UNESCO/FOLK/ASIA/99/1); WIPO - UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO - UNESCO/FOLK/AFR/99/1); See for example fact -finding mission to West Africa in 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), p. 151.

VIII. REGIONAL AND INTERNATIONAL PROTECTION

206. There are certain existing mechanisms and frameworks for regional and international legal protection of TCEs, such as:

(a) Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the Berne Convention) allows a designated authority of a Berne Member State to protect and enforce rights in unpublished and anonymous works, the authors of which are presumed to be nationals of the State concerned, in all other Berne Member States. As noted earlier in this document, this Article was specifically introduced with the international protection of expressions of folklore in mind. In other words, to turn this into a practical example: India, which is the only country to have formally made the designation referred to in the Article, can designate an authority to protect and enforce rights in expressions of folklore of which the authors are presumed to be Indian nationals, in any other Berne Convention country. In effect, an international system of protection appears to exist, in theory at least, for expressions of folklore that are “works.” It does not seem as if this mechanism has ever been used, however, and there are some practical limitations in using it. The relationship with Article 7 of the Convention on the term of protection may require further analysis, particularly Articles 7.3 and 7.8. For example, under the comparison of terms provision in the Berne Convention,¹⁴² the term of protection applicable in the country where protection is claimed, is the shorter of the terms applicable in that country or in the country of origin of the work. Therefore, unless the country in which protection is sought protects expressions of folklore indefinitely, the term of protection afforded to the work may have expired in that country. There may be other such limitations in applying Article 15.4. Such protection, applying as it does to anonymous works and operating for the benefit of States, is also not attractive to indigenous peoples and local communities who wish directly to exercise rights. However, it would seem that the practical workings of the Article, and its various advantages and disadvantages, deserves some further consideration, if only because it is an existing measure found in a convention to which many States are party;

(b) for those countries that provide protection for expressions of folklore as copyright works, the Berne Convention provides that all States that have ratified the Convention must protect foreign works according to the principle of national treatment. This means in effect that those countries that protect folklore as copyright works and are signatories to the Berne Convention enjoy protection for their expressions of folklore in each other’s countries. However, the comparison of terms and other provisions may again limit the practical relevance of this observation;

(c) under the intellectual property treaties of certain regional organizations, expressions of folklore are protected in the territories of the States signatories to those agreements according to the principle of national treatment. For example:

(i) in Chapter I of Annex VII of the Bangui Agreements specific protection is provided for expressions of folklore and for works inspired by expressions of folklore. The form of protection is based on copyright and the

¹⁴² Article 7.8, Berne Convention.

domaine public payant model.¹⁴³ The Agreement also deals with the protection for expressions of folklore in Chapter II on the Protection and Promotion of Cultural Heritage. The Agreement makes provision for national treatment. Therefore, the 15 countries that are members of the African Intellectual Property Organization (OAPI) and have ratified the accord are bound to protect each other's expressions of folklore according to the national treatment principle. Many of the countries are neighboring. It is not known, however, if there has ever been any practical application of these provisions; and,

(ii) Decision 351 on Copyright and Neighbouring Rights of the Andean Community provides protection *inter alia* to handicrafts based on the national treatment. In other words, the five States bound by the Decision are obliged to protect each other's handicrafts in a manner no less favorable than that accorded to their own nationals. It is not known whether this possibility has been used in practice;

(d) certain national laws, such as that of Panama, provide for a form of national treatment, but as the law is new, this aspect may not yet have been tested in practice.

207. It is not worthy that few, if any, States referred in their responses to the questions in the WIPO questionnaire of 2001 on the international protection of expressions of folklore, to Article 15.4 of the Berne Convention, or the Bangui Agreement or the Andean Decision 351 (as relevant). These existing measures appear little used and/or known.

208. While the majority of respondents to the WIPO folklore questionnaire of 2001 desired some form of international protection for TCEs, a certain number of countries appear not ready to embark upon the development of such an agreement. Certainly, several legal and conceptual questions remain and the diversity of approaches at the national level complicates efforts to reach a broad international agreement. A task proposed by the Secretariat to examine this question further was not approved by the Committee at its third session.

209. Most national laws provide a mechanism for the protection of foreign works, and it remains open to States in the reestablishment 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.

IX. CULTURAL HERITAGE COLLECTIONS, DATABASES AND REGISTERS

Introduction

210. This section addresses several questions lying at the points at which (i) cultural heritage and TCEs are first accessed by folklorists, ethnographers, ethnomusicologists, cultural anthropologists and other fieldworkers, and (ii) TCEs are documented, recorded, displayed and made available to the public by museums, inventories, registries, libraries, archives and the like.

¹⁴³ See Article 59.

211. The activities of collectors, fieldworkers, museums, archives etc., are important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Museums also play a valuable educational role.

212. However, the “public domain” status of cultural heritage and TCEs that are not protected by IP challenges efforts to protect the interests of indigenous and local communities in their cultural heritage and TCEs. This is particularly so in view of the growing trend of museums to digitize their cultural heritage collections and make them publicly available for both museological/curatorial as well as commercial purposes.

213. Indigenous peoples and traditional communities have expressed certain concerns associated with the collection, recordal, and making available of their tangible and intangible cultural heritage, particularly in relation to indigenous and customary obligations, and these concerns must also be addressed.

214. This section addresses:

(a) the possible development of IP -related *protocols, codes of conduct and guidelines* for use by fieldworkers as well as museums and others such institutions;

(b) the possible development of an IP *checklist 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;

(c) regarding specifically digitized cultural heritage, the development of model IP-related “*Rules of Use*” and “*Copyright Notices*” for use in connection with websites, CD - ROMs, specialized databases and other electronic multimedia products.

215. These were among suggestions made during previous WIPO and other activities (such as the WIPO fact -finding missions and the Folk Heritage Collections in Crisis Conference, organized by the American Folklore Society and the American Folklife Centre at the Library of Congress in December 2000).¹⁴⁴

216. This section also addresses whether or not it is advisable, from an IP standpoint, for cultural communities to undertake the recordal and documentation of public domain TCEs as a strategy for either:

(i) establishing IP in the TCEs (for “positive” protection purposes); or,

(ii) preventing the acquisition of IP in the TCEs (for “defensive” protection purposes).

¹⁴⁴ 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 Collections in Crisis Conference, December 1 to 2, 2000*.

217. Relevant issues that require exploration could include: (a) the relevance of registries, inventories and lists established under cultural heritage legislation and programs; (b) whether, for purposes of either positive or defensive IP protection of TCEs, a registration system is desirable and feasible; (c) the relevance in this regard of *suigeneris* database protection; (d) the role of digital rights management tools, referring to both user rules and content security, and (e) whether and if so how the documentation and recordal of TCEs can also foster and promote respect for relevant indigenous and customary obligations.

218. The European Community and its Member States and OAPI in their comment on WIPO/GRTKF/IC/4/3, and Switzerland during the Committee's fourth session, expressed support for activities in this regard as had been briefly outlined in that document. These related issues could, subject to budgetary considerations, be addressed collectively in one or more technical and expert workshops involving relevant IGOs, NGOs, cultural institutions and registrars such as those mentioned below and in previous documents. The results of those workshops could include progress on some of the items mentioned above and would be fed into the "WIPO Practical Guide" on the legal protection of TCEs and related traditional knowledge. 1

Cultural heritage museums and institutions

219. Responses to the WIPO folklore questionnaire of 2001,¹⁴⁵ the results of other WIPO activities and the WIPO Report on the fact-finding missions are replete with examples of cultural heritage museums and other institutions. A few examples from different regions are cited here:

(i) the Canadian Museum of Civilization is a federal Crown corporation which serves as the national museum of human history of Canada. The Museum's Cultural Studies program collects tangible folkloric artifacts as well as tapes of songs, languages, oral histories and personal narratives. To reflect the wishes of members of some Aboriginal groups regarding authorization of access to their expressions of folklore, the Museum's Ethnology section restricts access to some collections of sacred Aboriginal material to members of culturally affiliated groups, and does not make them available to members of the general public;

(ii) the Oman Center of Traditional Music, Muscat, Oman was created in 1983 to document, conserve and promote traditional Omani music. Since then the Center has documented more than 80% of Oman's musical traditions, including more than 23,000 photographs, 580 audiovisual recordings and a large number of sound recordings. The Center has also compiled digitized databases of these documentation materials. The Center has developed a two-step approach to documentation: first, the Center maps which traditions are still alive by speaking to traditional musicians and, second, the traditional music and dances are recorded in sound recordings, audiovisual recordings, photographs or a combination thereof. The Center takes a comprehensive approach to the documentation of musical traditions, which includes not only a recording of a particular musical work, but also of associated dances, social customs and gatherings, healing methods, planting and farming methods, fishing methods, handicrafts, etc. This comprehensive approach to documentation is necessary because "in Oman traditional music is part of traditional lifestyles," which

¹⁴⁵ For example, the responses of Antigua and Barbuda, Barbados, Burkina Faso, Gambia, Ghana, Honduras, Iran (the Islamic Republic of), Namibia, Panama, Senegal and the United States of America.

include healing, fishing, planting and other work techniques.¹⁴⁶ Its documentation work, the Center has identified more than 130 different types of traditional music in Oman, which can be classified, however, as expressions of four main traditions of Oman: sea and fishing songs, celebrations songs, Bedouin traditional music and traditional mountain music;

(iii) in China, national folk literature and arts are being recorded in the Ten Collections of the Chinese National Folk Literature and Arts (referred to as the “Great Wall of Civilization”). These Ten Collections comprises some 300 volumes of collections of Chinese songs, proverbs, operas, instrumental music, ballads, dances, and tales;¹⁴⁷

(iv) the Archive of Folk Culture at the American Folklife Center, Library of Congress, United States of America was established in 1928 and today maintains a multi-format, ethnographic collection that includes over two million photographs, manuscripts, audio recordings and moving images. The other major government repository for ethnographic material is the Center for Folklife and Cultural Heritage at the Smithsonian Institution. Established in 1967, its archive holds over 1.5 million photographs, manuscripts, audio recordings and moving images;¹⁴⁸

(v) in Ghana, the International Center for African Music and Dance (ICAMD), based at the University of Ghana in Legon aims at the promotion of international scholarship and creativity in African music and dance. One of its main priorities is to serve as an archival, documentation and study center for African music and dance. The center’s primary goal in this respect is to develop a unique library of oral texts (interviews, song texts, stories etc.), unpublished manuscripts and documentation of musical events (such as festivals, rituals and ceremonies), and the acquisition of manuscripts, books and audio-visual material on African music, dance, drama as well as general works in the field of ethnomusicology and music education. The documented works include anthropological and historical material on African societies and cultures, dictionaries and encyclopaedias of music, language dictionaries and a substantial collection of audio and video recordings of African music, dance and oral literature;¹⁴⁹

(vi) in Guatemala, efforts have been made to record and document certain expressions of traditional culture and folklore. A Registry of Archaeological, Historical and Artistic Property has been in operation since 1954, and its importance has grown in recent times. Its purpose is to record and thus maintain information on the historical origin, meaning and

¹⁴⁶ Meeting with officials of the Oman Center of Traditional Music, Muscat, February 27, 1999. 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).

¹⁴⁷ International Symposium on the Protection and Legislation of Folk/Traditional Culture (Beijing, December 18-20, 2001).

¹⁴⁸ Response of the United States of America. See also Bulger, P., “Preserving American Folk Culture at the Library of Congress”, paper delivered at International Symposium on the Protection and Legislation of Folk/Traditional Culture (Beijing, December 18-20, 2001).

¹⁴⁹ ICAMD Newsletter, September, 1998 and at meeting with Professor J. H. Kwabena Nketia, Director, ICAMD, January 25, 1999. 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). On documentation of expressions of folklore in Africa, see also Mould-Idrussu, B., “The Experience of Africa”, WIPO-UNESCO World Forum, Phuket, 1997, p. 17ff.

features of cultural expressions. The Registry records not only artifacts, monuments and other tangible objects of the national cultural heritage (including all pre-Hispanic, Mayan objects), but also intangible expressions of national cultures such as traditional *fiestas*, oral traditions and legends. In Guatemala, the latter were being compiled and documented in particular by the *Centro de Estudios Folclóricos* of the *Universidad de San Carlos*;¹⁵⁰

(vii) the Centre of Arab and Mediterranean music “Ennejma Ezzahra”, Sidi Bou Said, Tunisia was established in 1991 with the objectives of: documentation and conservation of expressions of traditional Arabic and Mediterranean music; establishment of a database comprising an extensive and almost exhaustive set of recordings of traditional Tunisian music; publication and making available of such music to the public; publication of studies and research on traditional Tunisian, Arabic and Mediterranean music; and, organization of concerts. The Centre has compiled an impressive collection of documents through a systematic approach for such purpose. These documents are classified and made available to the public. It includes at its premises a Research Center, which offers research facilities for students and scholars in the field of musicology;¹⁵¹

(viii) in Laos, *La Banque de Données Ethnographiques du Laos*, containing 60 000 digitized photographs of traditional dress, musical instruments, handicrafts and textiles.

Relevant international conventions and programs

UNESCO

220. UNESCO has undertaken several initiatives at the international, regional and national levels concerning the identification, conservation, preservation and dissemination of “intangible cultural heritage” and/or “traditional culture and folklore.”

221. A number of instruments, recommendations and programs have been adopted and established by UNESCO over the years:

(i) the 1966 Declaration on the Principles of International Cultural Cooperation¹⁵² states in Article 1: “1. Each culture has a dignity and value which must be respected and preserved. 2. Every people has the right and the duty to develop its culture. 3. In their rich variety and diversity, and in their reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind;”

(ii) the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit

¹⁵⁰ Meeting with representatives of the Ministry of Culture, Guatemala, January 18, 1999. See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Mission on Intellectual Property and Traditional Knowledge* (1998-1999), (WIPO, 2001).

¹⁵¹ See also intervention of Tunisia at First Session of the Intergovernmental Committee (WIPO/GRTKF/IC/1/13, par. 36) and WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Mission on Intellectual Property and Traditional Knowledge* (1998-1999), (WIPO, 2001).

¹⁵² <http://www.unesco.org/culture/laws/cooperation/html_eng/page1.shtml>

Import, Export and Transfer of Ownership of Cultural Property, 1970 seek to protect “cultural property”¹⁵³ against theft, illicit export and wrongful alienation. States which are party to the Convention are bound to return to other State Parties cultural property that has been stolen from a museum or similar institution and is inventoried, to take measures to control the acquisition of illicitly traded cultural objects by persons and institutions in their country, to cooperate with other States having severe problems of protection of their heritage by applying import controls based on the export controls of other States Parties, and to take steps to educate the public. In furtherance of the Convention, UNESCO requested the International Institute for the Unification of Private Law (UNIDROIT) to draw up a new treaty to complement the 1970 UNESCO Convention by providing minimal rules of uniform law. This resulted in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995.¹⁵⁴ UNESCO’s International Code of Ethics for Dealers in Cultural Property is a voluntary code designed to harmonize practice in the art trade along the principles of its international standard setting instrument to prevent illicit traffic in cultural goods;

(iii) the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (“the World Heritage Convention”) was adopted by the General Conference of UNESCO in 1972. The Convention defines the kind of natural¹⁵⁵ or cultural¹⁵⁶ sites which

¹⁵³ “Cultural property” as defined in Article 1 of Convention “... means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belong to the following categories:

- a. rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- b. property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- c. products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- d. elements of artistic or historical monuments or archaeological sites which have been dismembered;
- e. antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- f. objects of ethnological interest;
- g. property of artistic interest, such as:
 - (i.) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii.) original works of statuary art and sculpture in any material; (iii.) original engravings, prints and lithographs; (iv.) original artistic assemblages and montages in any material;
- h. rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- i. postage, revenue and similar stamps, singly or in collections;
- j. archives, including sound, photographic and cinematographic archives;
- k. articles of furniture more than one hundred years old and old musical instruments.

¹⁵⁴ <<http://www.unesco.org/culture/legalprotection/>>

¹⁵⁵ The Convention defines “natural heritage” as follows: Article 2 “... natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value

can be considered for inscription on the World Heritage List, and sets out the duties of States Parties in identifying potential sites and their role in protecting and preserving them. By signing the Convention, each country pledges to conserve not only the World Heritage sites situated on its territory, but also to protect its national heritage. The Convention further explains how the World Heritage Fund is to be used and managed and under what conditions international financial assistance may be provided;

(iv) UNESCO's work on the protection of folklore resulted in 1989 in the Recommendation on the Safeguarding of Traditional Culture and Folklore. This Recommendation encourages international collaboration, and considers measures to be taken for the identification, conservation, preservation, dissemination and protection of traditional culture and folklore. In 1999, an International Conference was held in order to assess the implementation and application of the Recommendation;¹⁵⁷

(v) the Living Human Treasures program began in 1996 for the purpose of promoting the transmission of traditional knowledge and skills by artists and artisans before they are lost through disuse or lack of recognition. The guidelines define 'Living Human Treasures' as "persons who embody, who have in the very highest degree, the skills and techniques necessary for the production of selected aspects of the cultural life of a people and the continued existence of their material cultural heritage;"

(vi) in 1998, a program on Masterpieces of the Oral and Intangible Heritage of Humanity was created to honor the most remarkable examples of cultural spaces (defined as places in which popular and traditional cultural activities are concentrated or a specific time usually chosen for some regularly occurring event) or forms of popular and traditional expressions such as languages, oral literature, music, dance, games, mythology, rituals, costumes, craftwork, architecture and other arts as well as traditional forms of communication and information.¹⁵⁸ In addition, it is to encourage governments, NGOs and local communities to take the lead in identifying, preserving and drawing attention to their oral and intangible heritage;

(vii) the UNESCO Programme for the Preservation and Revitalization of Intangible Cultural Heritage has launched a publication series to help specialists catalogue and compile

from the point of view of science, conservation or natural beauty."

<<http://www.unesco.org/whc/nwhc/pages/doc/main.htm>>

¹⁵⁶ The Convention defines "cultural heritage" as follows: Article 1 "...monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, caved wells and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view."

<<http://www.unesco.org/whc/nwhc/pages/doc/main.htm>>

¹⁵⁷ Unesco and the Smithsonian Institution co-organized an international Conference entitled "A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation", held in Washington D.C., June 27 -30, 1990.

¹⁵⁸ <<http://www.unesco.org/culture/heritage/intangible/index.shtml>>

inventories of cultural forms, since they are constantly changing and may disappear forever on the death of their creators. The first volume in this series is a *Handbook for the Study of Traditional Music and Musical Instruments*.¹⁵⁹ A handbook for the study of vernacular architectural styles is in preparation.

222. Most recently, at UNESCO's General Conference, 31st Session, a Resolution was adopted according to which a new standard-setting instrument on the protection of traditional culture and folklore is being developed.¹⁶⁰ The Resolution invited the Director-General to submit to the General Conference at its 32nd session, scheduled to take place in late 2003, a report on the possible scope of such an instrument, together with a preliminary draft international convention.¹⁶¹ Work on this instrument is proceeding rapidly and a third intergovernmental meeting is planned for June 2003. As pointed out by Canada and OAPI in their comments on WIPO/GRTKF/IC/4/3, this process is directly relevant to the Committee's work on TCEs, and Canada called for enhanced cooperation between WIPO and UNESCO in this regard.

223. There are also several documentation initiatives at the international level. For example, UNESCO has produced, jointly with the African Cultural Institute, a guidebook entitled *Crafts: methodological guide to the collection of data*.¹⁶² Using this guidebook, and following its wide distribution to UNESCO Member States in English, French, Spanish and Arabic, computerized databases will gradually be established by UNESCO, which will be accessible through international networks. This network for the worldwide collection and dissemination of data on craft forms and techniques will have its focal point in the International Centre for the Promotion of Crafts, which was established in September 1996 in Fez, Morocco. UNESCO has also published the "UNESCO Collection of Traditional Music of the World."

International Trade Centre (ITC)

224. The International Trade Centre (ITC) is operated jointly by the World Trade Organization (WTO) which created the body, and the United Nations Conference on Trade and Development (UNCTAD). The ITC focuses on technical cooperation with developing countries in the promotion of trade. The main program areas of ITC include product and market development, development of trade support services, trade information, human resource development, international purchasing and supply management, and needs assessment and program design for trade promotion.

¹⁵⁹ Dournon, Geneviève. *Handbook for the Study of Traditional Music and Musical Instruments*. Paris: UNESCO, 1999.

¹⁶⁰ 31C/Resolution 30.17 Member States formally expressed in written form their reservations in relation to the adoption of the resolution on this item: Argentina, Barbados, Denmark, Finland, France, Germany, Grenada, Greece, Mexico, Netherlands, Norway, Portugal, Saint Lucia, Spain, St. Vincent and the Grenadines, Sweden, Switzerland.

¹⁶¹ See < <http://unesdoc.unesco.org/images/0012/001246/124687e.pdf> > - Records of the General Conference - 31st Session - Paris, 15 October to 3 November - "Resolutions"

¹⁶² UNESCO/ICA, *Crafts: methodological guide to the collection of data* (by Jocelyn Etienne Nuge) Paris: UNESCO/ICA, 1990.

225. In collaboration with UNESCO, in 1996, ITC published a report entitled “Overview of Legal and Other Measures to Protect Original Craft Items.”¹⁶³ The Report proposed the establishment of a structure which should provide two-fold protection, namely protection of the artisans and craftspeople (the professionals) and the protection of intellectual property rights. The Report further stated that the protection of the professionals should be entrusted to a guild chamber, which should be set up in each country and would serve to defend the interests of its members.¹⁶⁴ In addition, the protection of intellectual property rights in the crafts should be under the responsibility of a national society for original craft items (NSOCI). It would supervise and guide the guild chamber and provide the link between the bodies in question.¹⁶⁵ More recently, in July 2000, the ITC published a report “Legal and Other Measures to Protect Crafts”, based upon work undertaken, in collaboration with WIPO, in Bolivia, Colombia and Peru.

226. In respect of artisanal products (or handicrafts) in 2000 the ITC adopted a new World Customs Organization (WCO) recommendation, which requested countries to codify artisanal products in national statistical nomenclatures.¹⁶⁶

227. In January 2001, a workshop organized by the ITC and WIPO took place in Havana, Cuba on the legal protection of original craft items. The development of effective national systems for the protection of craft items was advised, as well as the need to develop a relationship of trust with the members of the craft sector.¹⁶⁷

The access to and making available of TCEs by fieldworkers, museums and archives

228. As has been earlier discussed, there is a “need for balance and coordination between preservation and protection, and a clear relationship between the exercise of positive protection and the maintenance of the public domain. This arose in a practical way in the process of preservation of TK or TCEs, because this very process can trigger concerns about lack of protection and can run the risk of unintentionally placing TK/TCEs in the public domain or inadvertently giving third parties unrestricted capacity to use TK/TCEs against the originating community’s own values and interests. This occurs most obviously when preservation is undertaken without the authorization of the traditional owner or custodian, for example the unauthorized recording of performances of expressions of folklore or the documentation or dissemination without consent of traditional medical knowledge that may be considered confidential or secret. But this tension also arises when the process of preservation is undertaken with the consent or involvement of the TK holder, but unwittingly or incidentally undermines protection of TK or TCEs – this can occur when material is recorded or documented without full understanding of the implications. Hence the process of preservation can be in tension with the desire to protect TK and TCEs when disclosure, recording or documentation of this material undermines interests and precludes potential IP rights, and may place it in the public domain without the originating community’s or TK

¹⁶³ CLT-96/WS/5, 1996.

¹⁶⁴ ITC/UNESCO.op.cit.

¹⁶⁵ *Ibid.*

¹⁶⁶ ITC/AG(XXXIV)/185, February 27, 2001.

¹⁶⁷ WIPO-ITC/DA/HAV/01/03, January 30 -February 1, 2001.

holder's awareness of or consent to the full implications of preservation. Concern to avoid this was widely voiced in the Committee's discussions." ¹⁶⁸

An example

229. In the context of TCEs, these questions touch primarily upon copyright and related rights. For example, to take the case of a field worker who records the performance of a traditional song on audiotape with the consent of the performer, who for purposes of this example is a member of the cultural community from which the song originated.

(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 field worker (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 field worker 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 depositor 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 (field worker) 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 bearer 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 such recordings vest normally in either the field worker (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.

¹⁶⁸ Document WIPO/GRTKF/IC/5/12, paragraph 26.

(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 performer 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”¹⁶⁹). It is not a 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/or 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.¹⁷⁰ 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

¹⁶⁹ 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.

¹⁷⁰ WIPO/GRTKF/IC/3/17, par. 271.

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 fixation only, and Article 19 of the Rome Convention provides that once a 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)).

230. 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.

Protocols, codes of conduct and guidelines

231. As this example shows, collectors (field workers) and archives lie at the junction between communities and the marketplace. They can therefore play a key mediatory role in protecting TCEs while also making it possible for people to use, reuse and re-create cultural heritage which is vital to its survival. However, the IP aspects require consideration and management, and in this respect, protocols, codes of conduct and/or guidelines dealing with the IP aspects may be useful for both communities and for collectors, museums and archives. Member States of WIPO have expressed support for work in this area.¹⁷¹

232. Anthropologists, folklorists, ethnomusicologists and others have discussed this issue at length,¹⁷² and there are already several policies, ethical codes, protocols and guidelines developed by folklorist, ethnographic and anthropological societies and other professional bodies, although few appear to deal with IP questions.

¹⁷¹ WIPO/GRTKF/IC/4/15, and comments of the European Community and its Member States on WIPO/GRTKF/IC/4/3.

¹⁷² 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 Ethic 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.

233. In developing IP -related protocols, codes of conduct and/or guidelines, some existing examples of protocols and codes of conduct could be used as a starting point:

- (i) the Australian National Association for the Visual Arts (NAVA) report *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector*. The report has raised public 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;¹⁷³
- (ii) the Statement of Ethics of the American Folklore Society;
- (iii) the Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services;
- (iv) the Code of Practice of the Australian Arts Council for the Australian Visual Arts and Craft Sector;
- (v) the Research Policy of the Working Group of Indigenous Minorities of Southern Africa (WIMSA);
- (vi) from Canada, the Inuit Tapiriit Kanatami Guidelines for Responsible Research, the Dene Cultural Institute Guidelines and the Traditional Knowledge Research Guidelines: A Guide for Researchers in the Yukon, prepared by the Council of Yukon First Nations;
- (vii) previous Possessions, New Obligations (Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples).

234. 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.¹⁷⁴ 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-holder 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 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, whom they may have an opinion as to 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

¹⁷³ See Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, page 139.
¹⁷⁴ Chaudhuri, *op. cit.*, page 36.

repository is the final curator, and the researcher is the applicant for permission to use the material.”¹⁷⁵

235. At the Oman Centre of Traditional Music, experts at the center regard the development of new ways of promoting the musical heritage in Oman without the consent of the traditional performer as a violation of the customary understanding of heritage use, they do not believe that exclusive rights should be granted in the reproduction of traditional music. Nevertheless, they do welcome the grant of performers' rights to the performers of traditional Omani music.¹⁷⁶

A checklist and model IP contractual clauses

236. Closely linked to the development of protocols, codes of conduct and/or guidelines, would be the development of IP tools to use in elaborating deposit, access, release and license agreements used by ethnomusicologists and other field workers, archives, museums, libraries and other institutions. These tools could include a checklist of key issues that should be considered and model IP-related clauses for such agreements. Member States of WIPO have expressed support for work in this area.¹⁷⁷

237. Several examples exist of licence and other agreements that could be used as a basis for such work. For example, the Australian Arts Law Center and the Working Group on Indigenous Minorities of Southern Africa (WIMSA) have developed model agreements and 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, audio visual recordings and photographic material. As a part of the Center, Smithsonian Folklife Recordings hold 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.”¹⁷⁸

Digitized cultural heritage – “Rules of Use” and “Copyright Notices

238. Cultural heritage is a rich resource for feeding the communication networks of the information society with cultural content. Museum and other collections are increasingly being digitized and presented in a variety of electronic media, such as websites, CD-ROMs, and specialized databases. This is being done for museological/curatorial and commercial purposes, such as for making educational, scientific and commercial by-products.¹⁷⁹ The interaction of the cultural heritage with the information society poses some complex

¹⁷⁵ Personal communication with Ms. Peggy Bulger, Director and Mr. Michael Taft, Folklife Specialist, American Folklife Center, October 15, 2002.

¹⁷⁶ Paper by Dr. Jaber Bin Marhoun Flaifi Al Wahaiby, Director General, International Organizations Department, Ministry of Commerce and Industry, Oman, delivered at WIPO International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge, Bulgaria, May 29 to 31, 2001.

¹⁷⁷ WIPO/GRTKF/IC/4/15, and Comments of the European Community and its Member States on WIPO/GRTKF/IC/4/3.

¹⁷⁸ See < <http://www.folkways.si.edu/licenserequests.htm> >. See also Seeger, A., “Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethic of Intellectual Property,” 1996 Yearbook for Traditional Music, p. 87.

¹⁷⁹ See Vinson, Isabelle, Museum International, 215, September 2002, pages 4 to 7.

challenges and questions, however, particularly insofar as public domain TCEs are concerned.

239. Regarding digitized cultural heritages specifically in relation to public domain TCEs, the development of model IP-related “*Rules of Use*” and notices (such as “*Copyright Notices*” for copyright works) for use in connection with websites, CD-ROMS, specialized databases and other electronic multimedia products could be useful. Useful here would be the experiences of the Canadian Heritage Information Network (CHIN) and the Arts Law Center of Australia, among others.

240. A further issue that may require attention is, in cases where IPRs might arise in respect of digitized collections of cultural heritage and/or databases thereof, the management of possible tensions between such rights and the rights and interests of cultural communities under indigenous and customary laws. This is a matter that is being taken up by the study on customary and indigenous law.

Documenting, recording and inventorying TCEs

241. While these issues concern mainly collections established and held by others, this section also addresses whether or not it is advisable, from an IP standpoint, for cultural communities to undertake the recordal and documentation of their public domain TCEs as a strategy for either:

- (i) establishing IP in the TCEs (for “positive” protection purposes); or,
- (ii) preventing the acquisition of IP in the TCEs (for “defensive” protection purposes).

The documentation and recordal of TCEs as an IP strategy for positive protection

242. The documentation of traditional knowledge related to technical areas such as medicine, biodiversity conservation and agriculture for defensive as well as positive protection purposes is receiving much interest. However, this raises practical and policy questions about the desirability of documentation and publication of TK, given the limitations that have been encountered in applying positive rights to TK that has been publicly disclosed. These questions are explored more fully in document WIPO/GRTKF/IC/5/5. It is also uncertain whether and how documentation and recordal of TCEs is a valuable strategy for establishing positive rights in the TCEs, at least insofar as copyright in literary and artistic works are concerned.

243. Apart from the huge costs involved in documenting and recording TCEs, the copyright that may vest in the documentation and recordings may (i) not vest in the communities themselves (unless they are the authors or have taken assignment of the rights) and (ii) in any event extend only to the ways in which the TCEs are expressed and not to the “ideas” represented by the TCEs. Documentation and recordal, on the other hand, and particularly if it is made available in digitized form, makes the TCEs more accessible and available and may undermine the efforts of communities to protect them. It would seem therefore that the mere documentation of literary and artistic works that are TCEs cannot stand alone as an effective strategy for acquiring IP in the TCEs. Documentation does of course play an important role in strategies for the safeguarding of cultural heritage and traditional cultures.

244. However, there are three areas worth pursuing that may require evaluation of the documentation/recordal of TCEs as a strategy for positive protection: the use of software and digital rights management tools; the protection available for collections and databases; and, the harmonization of industrial property documentation standards with cultural heritage documentation standards.

245. First, much work is being done on using software and digital rights management tools for the management of rights and interests in digitized collections of TCEs. These may offer useful avenues for protection of a technological nature and require further consideration. An example is work being undertaken by the Indigenous Collections Management Project, a collaborative project of the Distributed Systems Technology Center in Australia and the Smithsonian Institute's National Museum of the American Indian (NMAI) Cultural Resources Centre. While recognizing the potential benefits that digital technologies can offer with regard to the preservation and documentation of their histories and cultures, indigenous communities are also coming to understand the opportunities for misuse and misappropriation of their knowledge which may accompany digitization. Software tools which have been designed to enable indigenous communities to protect unique cultural knowledge and materials which have been preserved through digitization. These software tools described here enable authorized members of communities to: define and control the rights, accessibility and reuse of their digital resources; uphold traditional laws pertaining to secret/sacred knowledge or objects; prevent the misuse of indigenous heritage in culturally inappropriate or insensitive ways; ensure proper attribution to the traditional owners; and enable indigenous communities to describe their resources in their own words.¹⁸⁰

246. Second, the legal protection afforded to collections, anthologies and databases may offer some protection for documented and recorded TCEs. For example, a database of fading Native American rock art is both preserving and protecting the art.

247. 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.

248. 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.

249. 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

¹⁸⁰ Hunter, Jane; Koopman, Bevan; Sledge, Jane, "Software Tools for Indigenous Knowledge Management", September 2002. See also Hunter, Jane "Rights Markup Extensions for the Protection of Indigenous Knowledge", May 2002, and Wells, Kathryn, "A Model and Pilot Options for a Digital Image and Text Archive of Indigenous Arts and Knowledge; A Progress Report", 1997.

publication and presentation in the form of a collection, anthology or compilation. There would be nothing, therefore, to prevent an 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.

250. However, the prospect of *suigeneris* 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 right to prevent the extraction and/or re-utilization of the whole or of a substantial part of the database's contents. This protection applies irrespective of the eligibility of the contents for protection by copyright or by other rights.

251. 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 *suigeneris* database protection. However, whether this protection could, in principle, extend to individual expressions being extracted and re-utilized is doubtful.

252. 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. In this respect, the use of contracts to protect the rights of the TCE performers and/or tradition-bearers could be explored further.

253. 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 TCEs and related traditional knowledge. 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.

254. Third, a practical suggestion is that it may be important for 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)¹⁸¹), and tradition-based design documentation standards (such as the UNESCO methodological guide to the collection of data on crafts).

¹⁸¹ 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).

255. 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 cooperation program and in the WIPO Practical Guide on the legal protection of TCEs and related traditional knowledge.

Documentation of TCEs as a defensive IP strategy

256. This refers to the documentation of TCEs as a means of voiding the possibility of acquiring industrial property titles which have bearing on the use or production of TCEs, with particular reference to industrial designs but potentially also including patents. (The defensive protection of distinctive signs is dealt with below in this section immediately below on registers).

257. The WIPO fact -finding mission had suggested “three steps for an improved protection of traditional knowledge -based designs under the existing industrial design system: (1) standards for the documentation of traditional -based designs 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).¹⁸² 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 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.

258. 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 traditional -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.

259. While this may be pursued, 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 TCEs 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. On the other hand, clear prior publication may be useful in defeating third parties’

¹⁸² “Intellectual Property Needs and Expectations of Traditional Knowledge Holders” WIPO Report on Fact -finding Mission on Intellectual Property and Traditional Knowledge (1998 - 1999), p. 110

adverse claim that designs were new or original. Many of the practical considerations set out in document WIPO/GRTKF/IC/5/6 concerning defensive strategies in relation to patents and TK or genetic resources subject matter may be adapted and applied in this context as well.

The establishment of registers, lists and inventories of TCEs as an IP strategy

260. Cultural heritage programs at the international, regional and national levels frequently establish registers, lists and inventories of intangible and tangible cultural heritage as useful tools for identification, promotion and safeguarding. For example, Brazil has established a Registry of Intangible Heritage and the International Convention on the Safeguarding of the Intangible Cultural Heritage being discussed at UNESCO envisage the establishment at the national and international levels of registries, inventories and lists. However, do countries establish registries, lists and inventories play a role in IP strategies, either to establish positive rights or for defensive protection purposes?

261. Several States which have established *suigeneris* systems for the legal protection of TCEs have created a registrations system. Examples are Panama and the Philippines. Certain other countries also provide for registries, such as Cuba.¹⁸³ In the response of Costa Rica to the WIPO folklore questionnaire of 2001, detailed proposals are set out for how such registers could be established and managed.

262. The Model Provisions, 1982 do not provide for any form of registration or documentation, and the Model Law for the South Pacific countries does not do so either.

X. ACQUISITION, MANAGEMENT AND ENFORCEMENT OF RIGHTS

263. 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. In addition, reported use of existing IPRs where relevant appears limited to a few countries only. 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 TCEs, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries.

264. 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. They include:

¹⁸³ The Cuban Copyright Law, Law No. 14, in effect since 1977, provides specific protection for folklore including handicrafts. By Resolution No. 2, of 1993, the National Copyright Centre (CENDA) makes provision for the registration and optional legal deposit of protected works. A document received upon registering a work may be used as proof in dealing with third parties in the event of violation of copyright. See Dolores Isabel Aguero Boza, "Artisanal Works and Copyright", paper presented at WIPO/ITC Workshop on Legal Protection of Original Craft Items, Havana, January 30 to February 1, 2001, WIPO - ITC/DA/HAV/01/6.

- (a) 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;
- (b) 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;
- (c) the possible reduction of filing and renewal fees for indigenous peoples and traditional communities;
- (d) the establishment and strengthening of the institutional structures necessary to implement legislative provisions and other measures;
- (e) where possible, making use of existing or new collective management societies;
- (f) national consultations among producers of handicrafts and other expression of folklore;¹⁸⁴
- (g) the establishment of national focal points;¹⁸⁵
- (h) the establishment of legal and structural linkages between systems for the legal protection of traditional cultural expressions and researchers and archives; and,
- (h) the use of alternative dispute resolution (ADR).

[End of Annex and of document]

¹⁸⁴ Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), p.4.
¹⁸⁵ Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), p.4.