Key Policy Issues on Intellectual Property and Traditional Cultural Expressions

by

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I. INTRODUCTION

The goals of my presentation are two fold. First, I will survey preliminary background information on Traditional Cultural Expressions (TCEs) including definitional issues, the needs of stakeholders and the relevance of conventional IP systems for the protection of TCEs.

Second, I will discuss five selected key issues that have been come up in the deliberations of the IGC concerning the development of an international instrument on TCEs. These selected issues are: (i) whether to use the term "protection" or the term "safeguarding" to describe the scope of rights in the draft text on TCEs; (ii) whether to refer to misappropriation as a policy objective and how to define the term; (iii) whether to include time limits in the eligibility criteria for TCEs; (iv) the adequacy of the current provisions on international cooperation for responding to uses of TCEs that have international dimensions and raise jurisdictional and enforcement issues; and (v) the relevance of the principles of national treatment and reciprocity for the protection of the TCEs of foreigners.

II. BACKGROUND INFORMATION ON TCEs

A. Definition of TCEs

It is useful to recall the nature of TCEs. In general terms, one may refer to TCEs as the forms in which traditional culture is expressed. A working definition proposed in the Model Provisions by WIPO describes TCEs as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community ..." In this context, four categories of TCEs can be identified: verbal expressions, musical expressions, expressions by actions, and tangible expressions. Verbal expressions include stories, poetry and riddles, signs, symbols and indications. Musical expressions comprise songs and instrumental music while expressions by actions may take the form of dances, plays and artistic forms or rituals. The fourth category, tangible expressions consists of (i) productions of art, such as drawings, paintings, carvings, sculptures, pottery, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; (ii) crafts; (iii) musical instruments; and (iv) architectural forms.

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Among the key characteristics of TCEs are the following.

1. First, they are the products of creative intellectual activity,
2. Second, they are handed down from one generation to another, either orally or by imitation,
3. Third, they reflect a community's cultural heritage and social identity,
4. Fourth, they are constantly evolving, developing and being recreated within the community.

B. Concerns of Stakeholders

Indigenous and traditional communities have expressed a number of concerns regarding commercial uses of TCEs without their consent. One concern relates to loss of their rights in TCEs when valuable pieces of TCEs are removed from the traditional communities and sold in markets or kept in museums and art houses. Community rights are also diminished where some parties successfully acquire intellectual property rights in TCEs such as art and craft, music and dance.

Another major area of concern is the unauthorized public disclosure and use of secret knowledge, images and other sensitive information pertaining to traditional communities. Indigenous culture is considered to be degraded when cultural items are displayed outside their traditional setting and for purposes different from those for which they were originally created as occurs for example, when religious artifacts are sold as mere decorative art. Similar considerations apply to the reproduction of sacred and secret imagery in inappropriate contexts such as T-shirts. Objections have also been raised against the use of indigenous names in symbols under circumstances perceived to be demeaning such as mascots or names of sports teams.

Related to concerns about cultural degradation are issues of authenticity and misrepresentation as the need to satisfy the demand for traditional art and craft often leads to mass-production, inferior quality goods, and cheap imitations of TCEs.

C. Relevance of IP Laws

Intellectual property instruments can and are being used as a policy response to these concerns of indigenous and traditional communities. For example, TCEs can be protected as literary and artistic works under copyright law; performances of TCEs under the WIPO Performances and Phonograms Treaty; hand-woven textiles under industrial designs law; and indigenous names, words and symbols under trademarks and geographical indications laws.

However, it is acknowledged that the scope of protection could be limited by certain considerations in IP law such as ownership, originality, and duration. IP statutes assume that protection would be accorded in most cases to the creator of works sought to be protected. Intellectual property laws reflect a bias in favor of individuals who are said to own rights in the protected works. Because different concepts of ownership rights apply in indigenous and traditional systems, including communal ownership of property interests, some TCEs may not fall within the purview of IP law.

In addition to this general problem of ownership, some TCEs may not even meet the specified statutory criteria for protection. Generally, copyright law requires protected works to be original. Under Ghanaian law, a work is original "if it is the product of the independent efforts of the author."

It may be difficult to protect some TCEs on this basis since their originality would be difficult to establish. For example, there may be a problem identifying an individual who could claim authorship given the passage of TCEs through generations of people in the community. It is obvious that while an individual may have indeed created a particular TCE, it would eventually have been acquired and used by the society at large and gradually, with the passage of time, have lost its individualistic traits.

Moreover, modern intellectual property rights are not of unlimited duration. For example, patents are generally granted for twenty years, and copyrights last for the life of an author plus fifty years. In contrast, a TCE could exist for centuries before it is abandoned or "forgotten,"and thus, it is impossible to limit its protection to the finite regimes of intellectual property.

III. SELECTED KEY ISSUES IN THE PROTECTION OF TCEs

I will now proceed to discuss some selected issues that have come up in the deliberations of the IGC regarding the protection of TCEs.

A. Protection versus Safeguarding

A key issue that has emerged in the work of the IGC on TCEs concerns how to describe the scope of the proposed instrument. Article 5 of the Draft Article contains two proposals, the first calls for reference to "scope of protection" and the second, to "scope of safeguarding"

1. Distinctions

It is important to distinguish between the terms "protection" and "safeguarding." Safeguarding has two broad elements – first, the preservation of the living cultural and social context of TCEs, so that the customary framework for developing, passing on and governing access to TCEs is maintained; and second, the preservation of TCEs in a fixed form, such as when TCEs are recorded. Preservation in this sense has the goal of assisting the survival of the TCEs for future generations of the original community and ensuring its continuity within an essentially traditional or customary framework.

By contrast, 'protection' in the work of the IGC has tended to refer to measures to prevent some form of unauthorized use of material by third parties. It is this kind of protection, rather than safeguarding or preservation, that is the general function of intellectual property systems.

IP related objectives that have been discussed at the IGC include the prevention of:

1. unauthorized commercial exploitation of TCEs;
2. insulting, degrading or culturally offensive use of this material;

3. false or misleading indications that there is a relationship with the communities in which the material has originated; and
4. failure to acknowledge the source of material in an appropriate way.

In each of these cases, owners and custodians of TCEs can use specific IP rights to prevent others from undertaking these activities without authorization.

2. Historical References

Historically, the term "protection" has been used in referring to the work of the IGC, first by the WIPO General Assembly and later by the IGC itself. For example, it is the term used by the General Assembly to describe the mandate of the IGC when the IGC was proposed in September 2000. At that time the WIPO General Assembly described the mandate in the following general terms:

> The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultations: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.

Consistent with that mandate, the IGC itself has emphasized "protection" in defining the work to be carried out with regards to TCEs. For instance, at its twelfth session, the IGC decided that the Secretariat "will, taking into account the previous work of the Committee, prepare as the working draft document ..., a document that will: (a) describe what obligations, provisions and possibilities already exist at the international level to provide *protection* for TCEs (emphasis added).

Significantly, the working document that was produced in response to this IGC directive reiterates a preference for "protection" over "safeguarding" in the following terms. "While instruments and programs for the preservation and promotion of TCEs as such are valuable and complement the protection of TCEs, consistent with the February 2008 decision of the Committee the focus of this analysis is on the legal protection of TCEs."

From this survey, it is evident that the term protection is the more appropriate term for two reasons. First, it deals with subject-matter and policy objectives that have been identified as central to the needs of the stakeholders such as the prevention of unauthorized commercial exploitation of TCEs; and second, such use is supported by decisions and preferences expressed by the WIPO General Assembly and also by the IGC.

B. Misappropriation: Policy Objective and Definitional Issues

Preventing the misappropriation of TCEs has been proposed as a policy objective in Article 1 of the Draft Articles on TCEs. Although the term "misappropriation" is not defined in the Draft Articles on TCEs, it has been defined in the draft texts on GRs and TK.

Similarly, the term "unlawful appropriation" is also referred to but not defined in the Draft Articles on TCEs.

In the context of the IGC's work on TCEs, the central questions that have arisen are whether to retain misappropriation as a policy objective and if so, how to define misappropriation and/or unlawful appropriation.

A common denominator in all the proposed definitions of misappropriation is the use of the relevant subject matter (GRs, TK) without the consent of the rights holders. Thus, there should not be a difficulty agreeing to this at a minimum, as part of the definition of misappropriation in the Draft Articles on TCEs. However, it is the qualifiers and/or additions to this common denominator that could prove to be more problematic.

What I mean by qualifiers in this context are the terms that subtract from the common denominator found in the definition of misappropriation. They are generally of two types. First, those that link misappropriation to the acquisition by the user from the holder through improper means or a breach of confidence which results in a violation of national law in a provider country. Second, those that exclude from the definition of misappropriation acquisition by methods such as reading publications, purchase, reverse engineering and inadvertent disclosure resulting from the holders failure to take reasonable protective measures.

Incorporating these qualifiers into the definition of "misappropriation" would have the effect of removing from the scope of the instrument on TCEs matters that are of great interest to indigenous and traditional communities. For example, the measures proposed to be exempted from the definition of misappropriation such as reading publications, reverse engineering, purchase and inadvertent or deliberate disclosure involve the very acts that the indigenous and traditional communities consider to violate their rights in TCEs and therefore seek protection from. No doubt, it would defeat a key objective of the instrument on TCEs if instead of restricting these measures, they were rather endorsed as lawful.

With respect to the term "unlawful appropriation" it should be noted that the relevant literature rarely uses it to describe the commercial exploitation of TCEs of indigenous communities. Introduced relatively recently, the term has attracted rather limited support in the IGC. Interestingly, the description of the term "unlawful appropriation" consists of a compilation of the qualifiers found in the proposed definitions of misappropriation in the GR and TK texts. Thus, the definition of "unlawful appropriation" does not add anything new to the debate regarding misappropriation.

Indeed, there is the perception that the term "unlawful appropriation" may be a semantic manouevre to shift attention away from definitions of misappropriation under national laws which are similar to the common denominator I identified in the proposed definitions of misappropriation. Thus, by coining the new term "unlawful appropriation" States that are non-demandeurs in the context of the IGC negotiations and which do not wish to be associated with, or reminded about their own national legal definitions of misappropriation because they are consistent with the common denominator, could argue against use of the term "misappropriation" in favour of the term "unlawful appropriation" which has not been defined under their national laws.

C. Time Limits as Eligibility Criteria for TCEs

An option in Article 3 of the Draft Articles on TCEs would restrict protection of TCEs under the instrument to TCEs "that have been used for a period of time to be determined by each contracting party but not less than 50 years or a period of five generations." Thus, under that criterion, TCEs that are less than 50 years old would not qualify for protection.

At the beginning of my presentation, I highlighted four characteristics common to TCEs. None of those characteristics set a specific time limit as an eligibility criterion. To seek to place time limits as a condition of eligibility would be problematic and reflect a profound misunderstanding of the nature of TCEs and how they are created.

TCEs, probably originally the product of individuals, are taken by members of indigenous and traditional communities and put through a process of recreation, which through constant variations and repetition become a group product. This slowly evolving nature of TCEs will make it extremely difficult to determine when a particular variant of a work of TCE was first created for purpose of measuring time under the proposed eligibility criteria.

Furthermore, intellectual property law does not require the passage of time before new creations or inventions would qualify for protection and it is not altogether clear the rationale for seeking to so with respect to TCEs. An inventor for example, can apply for a patent as soon as he comes out with an invention that is considered to be novel, useful and non-obvious. Why should TCEs have to be around for at least 50 years to qualify for protection?

If the proposal to place time limits arises from the characteristic of TCE that it be passed from generation to generation, such application of the characteristic is clearly erroneous to the extent that the characteristic of TCE refers more appropriately to the mode TCEs are transferred within the community and is clearly not intended to set the length of time TCEs must be around for to qualify for protection.

D. Provisions on International Cooperation with Regard to Jurisdictional and Enforcement Matters

The Draft Articles on TCEs reflect largely domestic strategies for the protection of TCEs. Those strategies alone will not be adequate to tackle certain problems associated with the use of TCEs which have international dimensions and tend to require international cooperation. For example, national law is meaningless if the party who used a TCE without the required consent were to move to live in another country. Without cooperation from the second country, authorities in the first country will not be able to acquire jurisdiction over the party to make him account for any violations of rights to TCEs. Similar issues arise if the party were to move out of the country to avoid paying a judgement or to avoid other sanctions issued against him for such violation. Without cooperation again from the second country, it will be impossible to enforce the judgment.

Moreover, if the user were to acquire intellectual property rights in the second country related to

TCEs from the first country, again without the second state moving cooperatively to revoke the IP rights, the indigenous groups with ownership claims in the TCE in general would have no adequate legal remedies.

An international framework of protection of TCEs which imposes responsibilities on countries in terms of cooperation with regards to jurisdictional, enforcement and other matters would overcome some of these difficulties and enhance the global protection of TCEs.

However, despite the benefits of this form of international cooperation, there are no provisions for this in the current Draft Articles. Although there is a reference to transboundary cooperation in Article 14, it is limited only to cooperation to address the cases where similar TCEs are located in territories of different contracting States. The scope of transboundary cooperation in the Draft Articles would not extend to measures to tackle the jurisdictional and enforcement matters I have identified.

E. Recognition of Foreign Rights in TCEs: National Treatment and Reciprocity Principles

Related to the issue of international cooperation is the question of how to recognize foreign rights. The approaches commonly employed in various international law instruments to recognize the rights of foreigners include national treatment and reciprocity and I will examine their relevance for the protection of TCEs.

National treatment, which is a principle of non-discrimination, holds that an eligible foreign right holder should enjoy the same rights as domestic nationals. The Draft Articles on TCEs provide for national treatment. In this regard, Article 13 states: "Each ... Contracting Party ... should ... accord to beneficiaries that are nationals of other ... Contracting Parties... treatment no less favourable than that it accords to beneficiaries that are its own nationals with regard to the protection provided for under this ...instrument..."

A limitation in the national treatment principle is that where the contracting states have varying degrees of protection of the subject-matter, foreigners who move from jurisdictions with adequate schemes of protection to areas with weak or non-existent national schemes would find themselves shortchanged. This is because their host countries will not be required to recognize and enforce the superior rights of their home countries under the national treatment principle.

This is a problem that could arise with respect to TCEs because it is envisaged that the Draft Articles would create a large policy space for States, resulting in significant differences in the national schemes of protection that will be adopted by contracting states. It is reasonable to assume that some States would adopt far more comprehensive laws than others.

Under these circumstances, it would enhance the international protection of TCEs to complement the national treatment principle with the principle of reciprocity. Under the principle of reciprocity or reciprocal recognition, whether a country grants protection to nationals of a foreign country depends on whether that foreign country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle.

Protection of TCEs on the basis of reciprocity offers the possibility of fuller protection for foreign TCE rights holders than application of national treatment principle alone. This stems from the recognition that under the principle of reciprocity, Country A could recognize and enforce the TCE rights of a person from Country B even where Country A did not recognize such rights under its domestic (national) laws or has relatively weak laws. This flexibility of the reciprocity approach makes it suitable for the protection of foreign TCEs in contracting States that are reluctant to develop comprehensive national regimes for TCEs. Thus, under the reciprocity principle, those countries could still commit to protecting foreign TCEs without making significant changes to their national laws.

As an endorsement of the reciprocity principle, one of the early model intellectual property instruments developed by WIPO emphasized the need to protect expressions of folklore on that basis. Specifically, the Model Provisions required that "[e]xpressions of folklore developed and maintained in a foreign country [be] . . . protected . . . subject to reciprocity." The principle of reciprocity is also recognized in UNESCO's Illicit Trade Convention, which enables an aggrieved signatory party to file claims based on its domestic cultural property laws in another signatory state to recover cultural property illegally removed from the complainant's jurisdiction.

Thus, incorporation of the principle of reciprocity in the Draft Articles would be consistent with international best practices and would enhance quite considerably, the proposed protection of TCEs on the basis of national treatment

CONCLUSIONS

To conclude, I wish to summarize the main points I have developed in my discussion of the five selected issues.

First, "protection" rather than "safeguarding" is the more appropriate term to use to refer to the scope of a TCE instrument because "protection" deals with subject-matter and policy objectives that have been identified as central to the needs of the stakeholders such as prevention of unauthorized commercial exploitation of TCEs. Moreover, such use is supported by decisions and preferences expressed by the WIPO General Assembly and also by the IGC.

Second, misappropriation as a term, has traditionally been used to describe unauthorized uses TCEs. A common denominator in all the proposed definitions of misappropriation is the use of the relevant subject matter (GRs, TK) without the consent of the rights holders. Thus, it is possible to reach some consensus on this at least, as part of the definition of misappropriation and also stating it as a policy objective in the Draft Articles on TCEs. However, incorporating certain other proposed qualifying language into the definition of "misappropriation" would have the effect of removing from the scope of the instrument on TCEs matters that are of great interest to indigenous and traditional communities.

Third, to seek to place time limits as a condition of eligibility for protection of TCEs reflects a profound misunderstanding of the nature of TCEs and how they are created. Such time limits do not constitute essential characteristics of TCEs. Moreover, the slowly evolving nature of TCEs will make it extremely difficult to determine when a particular variant of a work of TCE was first created for purpose of measuring time under the proposed eligibility criteria.

Fourth, an international framework of protection of TCEs which imposes responsibilities on countries in terms of cooperation with regards to jurisdictional, enforcement and other matters would enhance the global protection of TCEs. Article 14 of the Draft Articles which limits international cooperation to address only cases where similar TCEs are located in territories of different contracting States could be beefed up to tackle jurisdictional and enforcement matters as well.

Finally, under the national treatment principle provided for in the Draft Articles, foreigners who move from areas where TCEs are adequately protected to areas where such protection is relatively weak would feel shortchanged in their host countries. The problem could be overcome by incorporating the reciprocity principle under which countries could still commit to protecting foreign TCEs without making significant changes to their national laws.