

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE

AN OVERVIEW OF THE WIPO IGC DRAFT PROVISIONS

1. Draft objectives and principles for the protection of traditional cultural expressions (“expressions of folklore”) have been developed in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC). They have been formally published, most recently as part of document WIPO/GRTKF/IC/10/4.
2. The drafts have not been adopted or endorsed by the IGC and may be developed further. They draw upon a wide range of community, national and regional experiences, and have been developed over several years by and in consultation with Member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties. The objectives and principles have been the subject of open commenting processes established by the IGC.
3. These draft materials are being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes. In line with many requests for background information on the issues they raise, this document is an informal summary of the draft provisions. Details of the background to the draft provisions, and the wide range of materials and perspectives that shaped them, can be found at <http://www.wipo.int/tk/en/index.html>.
4. While the draft provisions have no formal status, they illustrate some of the perspectives and approaches that are guiding work in this area, and could suggest possible frameworks for the protection of traditional cultural expressions (or “expressions of folklore”).
5. There are two distinct sets of draft objectives and principles being discussed in the IGC, the first dealing with traditional cultural expressions (“expressions of folklore”) and the second with traditional knowledge as such (TK). This responds to the choice made in many cases to address distinctly the specific policy and legal questions raised by these two areas. The draft materials are prepared, though, in the understanding that for many communities these are closely related, even integral, aspects of respect for and protection of their cultural and intellectual heritage. The two sets of draft objectives and principles are therefore complementary. Some jurisdictions protect both traditional cultural expressions and TK in a single instrument, while others use a range of laws and instruments to address the two areas, or specific aspects of them, distinctly.
6. Following is a brief introduction to and summary of the form of protection that is elaborated in the draft provisions relating to traditional cultural expressions. This could be used as an informal introduction to the provisions themselves.

A policy context

7. Traditional music, designs, rituals, performances, oral narratives, names, symbols and signs communicate a community’s beliefs and values, embody skills and know-how, reflect a community’s history, and define its cultural identity. Traditional cultural expressions (TCEs) are therefore valuable cultural assets of the communities who maintain, practice and develop

them. They can also be economic assets – they are creations and innovations that can, if so wished, be traded or licensed for income-generation and economic development. They may also serve as an inspiration to other creators and innovators who can adapt the traditional expressions and derive new creations and innovations.

8. This dual nature of these elements of a community’ cultural heritage - cultural and economic – raises a number of policy issues related to the protection, promotion and preservation of cultural heritage.

9. From an IP point of view, the protection or otherwise of expressions of traditional cultures forms an integral part of policies concerning the promotion and protection of creativity and innovation, community development and the stimulation and promotion of the creative industries as part of sustainable economic development.

10. However, the protection of expressions of traditional cultures touches also upon other important policy areas. These include the safeguarding and preservation of cultural heritage; freedom of expression; respect for the rights, interests and claims of indigenous and other traditional communities; recognition of customary laws, protocols and practices; access to knowledge and the scope of the “public domain”; addressing the challenges of multiculturalism; and, promoting cultural diversity, including linguistic diversity, and access to a diversity of cultural expressions.

The meaning of “protection” within an holistic policy context

11. TCEs can be “protected” in several complementary ways. A range of international policy processes and several international legal instruments address various aspects of protection, amidst calls for an holistic approach to protection of TCEs. Protection may include safeguarding against loss through, archiving, documenting and recording, building capacity to support traditional creativity and the bearers and social structures that sustain and express them, acknowledging the broader range of collective and individual rights that are linked to TCEs and their cultural and legal environment, and protecting TCEs against unauthorised or illegitimate use by third parties, including commercial misappropriation and misuse that is derogatory or offensive.

12. The draft provisions in WIPO document WIPO/GRTKF/IC/10/4 concern most directly the protection of TCEs in a legal sense, that is, protection of the creativity and distinctiveness inherent in TCEs against illicit uses and misappropriations, while taking into account the particular nature and characteristics of traditional creativity and cultural expression, including its communal quality, and the preference many have expressed to avoid distinct new property rights. This has been the approach of the IGC, in keeping with the mandate of WIPO, since the inception of its work.¹ “Protection” in this sense is, distinguishable from the “safeguarding” or “preservation” of cultural heritage and expressions, but complements them. Indeed, an holistic approach to protection of TCEs within this broader international context entails recognizing and complementing legal instruments and policy approaches in cognate policy areas, such as the UNESCO International Convention on the Safeguarding of Intangible Cultural Heritage, 2003 and the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005, and work in other forums such the United Nations Permanent Forum on Indigenous Issues and the Working Group on

¹ See previous documents, such as WIPO/GRTKF/IC/2/7, WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/4/3, WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/3.

Indigenous Populations of the Human Rights Council. Any new forms of protection for TCEs should also take into account existing IP treaties. For example, the WIPO Performances and Pronograms Treaty, 1996 (the WPPT) provides protection to performers of TCEs.

13. Only through such complementarity with instruments in other policy areas can truly comprehensive and holistic protection, preservation and promotion of TCEs be achieved. For example, the draft provisions are expressly intended to complement and work together with laws and measures for the preservation and safeguarding of cultural heritage, and practical suggestions in this regard are made throughout the provisions and the commentary.

A summary of protection in accordance with the draft provisions

14. As a distillation of the forms of IP-related protection of TCEs discussed within the IGC, the form of protection outlined in the provisions has the following general characteristics:

(1) The subject matter of protection is “traditional cultural expressions” or “expressions of folklore”, two terms which are intended to be interchangeable in view of the different practice internationally. The specific choice of terms would be determined at the national and regional levels (see draft Article 1).

(2) TCEs include tangible and intangible forms in which traditional culture and knowledge are expressed, communicated, appear or are manifested. They may be verbal expressions or symbols, musical expressions, expressions by action, such as dances and other performances, and tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms (see draft Article 1).

(3) To be eligible for specific protection, TCEs would need to meet three criteria. They should be: the products of creative intellectual activity, including individual and communal creativity; characteristic of a community’s cultural and social identity and cultural heritage; and, maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community (see draft Article 1).

(4) Protection of TCEs would benefit indigenous peoples and traditional and other cultural communities who have custody, care and safeguarding of TCEs in accordance with their customary laws and practices; and who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage. The term “communities” is broad enough to include the nationals of an entire country, a “nation”, in cases where TCEs are regarded under national laws and custom as “national treasures” and belonging to all the people of a particular country (see draft Article 2).

(5) TCEs would be protected at three optional levels (see draft Article 3):

– TCEs “of particular cultural or spiritual value or significance”, if registered or notified, would be protected against a wide range of uses and forms of reproduction and dissemination in the absence of the free, prior and informed consent (FPIC) of the community concerned. They would also be protected

against failure to acknowledge the source of the TCEs and distortion, mutilation or other modification of, or other derogatory actions as well as the acquisition or exercise of IP rights over TCEs or adaptations of them. Protection would also be available against the use of names, words and symbols that creates a misleading or disparaging link with the concerned community;

– Other TCEs (which are not registered or notified) would be protected through regulation of how they may be used by third parties. Such uses, which would not require FPIC, should be made in such a way that ensures the relevant community is identified, prevents distortion, mutilation or other modification of, or other derogatory action, as well as false, confusing or misleading linkages with the concerned community, and makes provision for equitable remuneration or benefit-sharing when the use or exploitation is for gainful intent; and,

– Secret TCEs would be protected against unauthorized disclosure, subsequent use, and the acquisition and exercise of IP rights by third parties.

(6) Prior authorizations to use TCEs, where required (see the three optional levels of protection above), would be obtained either directly from the community concerned or from an agency acting at the request of and on behalf of the community. This choice would be left to national law. The agency, which could be an existing office or authority, would also have additional awareness-raising, educational and advisory functions (see draft Article 4).

(7) Exceptions and limitations are set out to ensure the continuing customary use, transmission, exchange and development of TCEs within the traditional and customary context by members of the relevant community. Exceptions or limitations would also apply to illustration for teaching and learning; non-commercial research or private study; criticism or review; reporting news or current events; use in the course of legal proceedings; making of recordings and other reproductions for archives or inventory for non-commercial cultural heritage safeguarding; and incidental uses. In confirmation that national laws might wish to allow all nationals to use TCEs, as discussed above on the question of beneficiaries, national measures for the protection of TCEs might also allow unrestricted access and sue by all nationals of a country (see draft Article 5).

(8) Protection would continue for as long as TCEs continue to meet the criteria for protection, including the required linkages with an eligible community. Specific provisions on term could be put in place for registered TCEs (see (5) above) and secret TCEs (see (5) above) (see draft Article 6).

(9) As a general principle, protection would not be subject to any formality, although the stronger protection for specific TCEs of particular cultural or spiritual value or significance would require some form of notification or registration. Such registration is optional and would secure a higher level of protection. Non-registered TCEs remain protected but at a less high level. When registration or notification involves recording or other fixation of TCEs, the resulting IP rights would be held by the relevant community. The office receiving applications for registration should seek to resolve disputes as to which communities are entitled to register which TCEs (see draft Article 7).

(10) Regarding past and ongoing uses of TCEs, these should be brought into conformity with the provisions within a reasonable time, subject to respect for acquired rights (see draft Article 9).

(11) The protection provided for in the draft provisions complements and does not replace the protection already available under conventional IP systems, as well as laws and programs for the preservation and promotion of cultural heritage (see draft Article 10).

(12) International and regional protection would be achieved on the basis of a “national treatment” approach (see draft Article 11).

Addressing the international dimension

15. The draft objectives and principles could define a form of protection at international level. In common with other areas of law and policy, the draft provisions are also expressed in broad principles that could be implemented, interpreted and applied directly at the regional and/or national levels.

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