

**Protecting Traditional Knowledge and  
Folklore/Traditional Cultural Expressions  
Policy and Legal Challenges for Caribbean Countries**

**Paper presented at the  
Regional Expert Meeting on the Establishment of a  
Caribbean Framework for the Protection of Traditional Knowledge,  
Folklore/Traditional Cultural Expressions and Genetic Resources**

**Kingston, Jamaica  
March 18<sup>th</sup>, 2008**

**Sharon Legall  
Ph.D. Candidate  
Cambridge University  
United Kingdom**

## Introduction

Prior to this meeting, a “Draft Concept Note” was circulated to presenters for their guidance and consideration. The note alluded to a resolution by Caribbean Ministers that the World Intellectual Property Organisation (WIPO) assist in developing appropriate frameworks (including regional frameworks) for the protection of traditional knowledge and traditional cultural expressions. The note stated further that the establishment of a framework or frameworks for the protection of traditional knowledge (used in its broad sense)<sup>1</sup> raises two distinct but related issues:

- (1) The substance or content of protection; and
- (2) The legal, administrative and operational character of a regional framework.

It is suggested that while a “regional framework” is contemplated, certain preliminary issues must be addressed (if they have not already been settled). The first is how will the terms “traditional knowledge” and “expressions of folklore/traditional cultural expressions” be defined; and the second is whether a protection and/or preservation strategy should be adopted. These issues will be briefly discussed below as well as the challenges to the implementation of policy and legal options for the protection/preservation of traditional knowledge.

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<sup>1</sup> In this paper, the term “traditional knowledge” is used in its broad sense to include knowledge associated with all forms of science and technological as well as artistic, musical and literary expressions. However, there are instances when traditional knowledge, in its strict sense will be used and the terms “folklore”, “expressions of folklore” and/or “traditional cultural expressions” will be used where appropriate.

## Defining traditional knowledge

Recent (and ongoing) WIPO initiatives utilise the terms “traditional cultural expressions or expressions of folklore”<sup>2</sup> and “traditional knowledge”, and at the same time, reflect both a distinction and a relationship between them.<sup>3</sup> According to WIPO, the Draft WIPO Instruments under consideration, one dealing with traditional cultural expressions<sup>4</sup> and the other with traditional knowledge<sup>5</sup>, have been developed in response to the specific legal and policy questions raised by these two areas.<sup>6</sup> There is, however, no settled legal definition for either term.<sup>7</sup>

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<sup>2</sup> Actually, the term “traditional cultural expressions/expressions of folklore” is used by WIPO to denote the interchangeability of its components.

<sup>3</sup> See WIPO Secretariat, “Traditional Cultural Expressions/Expressions of Folklore-Legal and Policy Options”, IGC Sixth Session, Geneva, March 15 to 19, 2004, WIPO/GRTK/IC/6/3 at pp.11-12. Johanna Gibson suggests that while the distinctions drawn between traditional cultural expressions and traditional knowledge may seem relevant within the categories of the intellectual property model, the relevance of this distinction to the concerns of indigenous and traditional communities may be less likely where biological and technological resources are related to the cultural expression, knowledge, or practice that facilitates the cohesion and integrity of a particular group: see Johanna Gibson, “Intellectual Property Systems, Traditional Knowledge and the Legal Authority of Community” (2004) Vol.26 (7) E.I.P.R.280.

<sup>4</sup> See the Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (the Draft TCE Instrument).

<sup>5</sup> See the Draft Provisions for the Protection of Traditional Knowledge (the Draft TK Instrument). The Draft TCE Instrument and the Draft TK Instrument are collectively referred to as the Draft WIPO Instruments.

<sup>6</sup> Some jurisdictions, for example, protect both traditional cultural expressions and traditional knowledge in a single instrument, while others use a range of laws and instruments to address the two areas distinctly. Prior to the arrival of some level of consensus regarding terminology (and protection measures) by the IGC, the terminology used in national and international discourse could be described as “fluid”. The initial appearance and evolution of traditional knowledge as “folklore” in national and international discourse (the Tunis Model); the eclipsing of “folklore” by “traditional knowledge”; the re – emergence of folklore as traditional cultural expressions/ expressions of folklore as part of the folklore/traditional knowledge bifurcation; and the convergence of folklore and traditional knowledge; are all reflective of this fluidity in the discourse.

<sup>7</sup> See Draft Concept Note, WIPO/GRTK/KIN/08/1, at p.4.

A range of subject matter was identified during the Fact-finding Mission to the Caribbean Region (the Caribbean FFM) conducted by WIPO from May 30<sup>th</sup> to June 9<sup>th</sup>, 1999. The countries visited were Guyana, Jamaica, and Trinidad and Tobago. That mission was one of several missions conducted in different regions of the world to “enable WIPO to identify, as far as possible, the ...[intellectual property] needs and expectations of ...[traditional knowledge] holders”.<sup>8</sup>

The subject matter identified during that Caribbean FFM included subject matter typically associated with traditional cultural expressions as well as traditional knowledge.<sup>9</sup> The need for a commonly agreed definition of TK was identified in the 2001 WIPO Report, and this seems to remain a challenge for the region.

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<sup>8</sup> See Intellectual Property Needs and Expectations of Traditional Knowledge Holders. WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (Geneva, 2001) at p.17 (the 2001 WIPO Report).

<sup>9</sup> The subject matter identified as constituting “traditional knowledge” includes

- Traditional usage of fruits, plants and animals for medicinal purposes;
- Spiritual healing;
- Traditional fishing methods;
- Traditional birthing methods;
- Traditional bone setting techniques;
- Cultural heritage;
- Folksongs, dances and dramas;
- Rites and rituals;
- Traditional psychiatry;
- Religion;
- Trapping, hunting and fishing techniques;
- Traditional food culture and preservations techniques;
- Handicrafts;
- Traditional environmental preservation and conservation methods;
- Language.

How one defines “traditional knowledge” can influence the kinds of policy options and protection measures which may be suitable. The converse is also true in that policy options and protection measures also influence how “traditional knowledge” is defined.<sup>10</sup>

Before addressing possible policy and legal options, a brief comment will be made about defining “traditional knowledge” in the Caribbean in the context of the definitions which are proposed in the Draft WIPO Instruments.

Many of the “traditions” found in the Caribbean originated elsewhere.<sup>11</sup> As Professor Rex Nettleford writes “the Caribbean is the story of ‘arrivants’ from across the Atlantic and beyond, each group bringing a cultural equipage”<sup>12</sup> and building their own institutions with their own “inner logic and consistency.”<sup>13</sup> Out of this historical

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<sup>10</sup> In the WIPO report entitled “Traditional Knowledge – Operational Terms and Definitions”, it was observed that the concept of traditional knowledge in the national, regional and international forums, tend to be shaped by the policy framework governing that forum. As a result, there is a decentralised and disintegrated set of approaches in which the relevant issues are subject to differing policy considerations, cultural environments and analytical tools. Different terms can therefore be used for overlapping subject matter, and the same term may be used in contrasting ways: WIPO Document “Traditional Knowledge – Operational Terms and Definitions WIPO/GRTKF/IC/3/9 at para. 15.

<sup>11</sup> The 2001 WIPO Report, at p.194, referred to this issue in the context of ownership of traditional knowledge. It stated that “most Caribbean people have their origins in Africa, Asia [Europe] and South America. The discussion on this point centred around whether the Caribbean people could lay claim to benefits accruing from the use of knowledge which they brought with them from their countries of origin. The arguments were skewed in favour of the true beneficiaries being the source communities from which these knowledge systems originate. However, many recognised that the knowledge formations had evolved and that although they could have had roots in their countries of origin, they can now be identified with the Caribbean.”

<sup>12</sup> Rex M. Nettleford, *Caribbean Cultural Identity: The Case of Jamaica. An Essay in Cultural Dynamics* (Jamaica: Institute of Jamaica, 1978) at p.2.

<sup>13</sup> *Ibid.* See also Stuart Hall where he stated that “everybody in the Caribbean comes from somewhere else...That is to say, their true cultures, the places they really come from, the traditions that really formed them, are somewhere else. The Caribbean is the first, the original and the purest diaspora”: see Stuart Hall, “*Negotiating Caribbean Identities*” in Brain Meeks and Folke Lindahl, eds, *New Caribbean Thought. A Reader*, (Jamaica, Barbados, Trinidad and Tobago, The University of the West Indies Press: 2001) at pp.27-28. See also Wendy Knepper in “Colonization, Creolization, and Globalization: The Art and Ruses of Bricolage” (2006) Vol.21 Small Axe: A Caribbean Journal of Criticism, 70 where she states that

circumstance emerged what has been referred to as “creolisation” by Edward Kamau Brathwaite and other scholars which is the cultural interaction and convergence (or “interculturalisation”) that accompanied the ongoing social interactions between the variety of peoples in the plantation regions of the Americas.<sup>14</sup> Members of the different populations creatively drew on their diverse cultural heritages in an attempt to adjust to their new natural and social environments. In the process, a Creole culture consisting of both reinterpreted Old World and distinctively local cultural symbols and practices gradually emerged.<sup>15</sup> The steel pan of Trinidad and Tobago as well as Shakespeare

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“Caribbean identities, linguistic transformations, religious beliefs, music, cuisine, and aesthetic practices have been shaped by the fragmentation and intermixture of various traditions.”

<sup>14</sup> See for example, Edward Brathwaite, *The Development of Creole Society in Jamaica: 1770-1820* (Oxford: Clarendon Press, 1971). Creolisation, according to Lawrence O. Bamikole, can be stated as the “coming together of different elements in an interacting process, producing a new reality or entity which is neither one nor the other of the original elements, but which nevertheless share some features with the original elements”: see Lawrence O. Bamikole, “Creolisation and the Search for Identity in Caribbean Philosophy” (2007) Vol.53 No.3 Caribbean Quarterly, 70 at p.76.

<sup>15</sup> See Stephen Stuempfle, *The Steelband Movement. The Forging of a National Art in Trinidad and Tobago* (Philadelphia: University of Pennsylvania Press: 1995) at p.7. Writing in 1998, Verene Shepherd and Glen Richards stated that “approximately twenty – six years after its public launching, Kamau Brathwaite’s creole – society model is generally accepted as the leading interpretation of Caribbean society; and as a description of Caribbean society during slavery seems more appealing to those who question the slave society and plantation society constructs. It has been widely incorporated into the scholarship of the region, and resonates in diverse fields of Caribbean Studies, spreading beyond the confines of the discipline of history: see Verene Shepherd and Glen Richards, “Introduction” (1998) Vol.44 Nos.1&2 Caribbean Quarterly, vi at p.vii. “Kamau Brathwaite’s intellectual influence has been widely diffused at the international level”, according to Shepherd and Richards, “and much of contemporary post – colonial discourse and literary criticism is infused, although not always acknowledged, with the spirit and style of Brathwaite’s poetic concept”: *ibid.* Mary Louise Pratt conveys Brathwaite’s creole – society concept in her use of the term ‘transculturation’ which she argues

“treats the relations among colonisers and colonised...not in terms of separateness or apartheid, but in terms of co – presence, interaction, interlocking understandings and practices, often within radically asymmetrical relations of power”: see Mary Louise Pratt, *Imperial Eyes: Travel Writings and Transculturation* (London and New York: Routledge, 1992) at p.7.

Homi Bhaba’s concept of ‘hybridity’ also seems to share in the spirit and poetic expression of Brathwaite’s work when he writes that if

“the effect of colonial power is seen to be the *production* of hybridisation rather than the noisy command of colonialist authority or the silent repression of native traditions – then an all important change of perspective occurs”: see Homi Bhaba, “Signs Taken as Wonders” in Bill Ashcroft, *et al*, eds. *The Post – Colonial Studies Reader* (London and New York: Routledge, 1992) at p.35.

Mas in Carriacou and Jonkunnu in Jamaica and the Bahamas can all be characterized as “creole” or syncretic cultural products or practices.

Where the criteria for the protection of “traditional cultural expressions” in the Draft TCE Instrument stipulates, *inter alia*, that it be “characteristic of a community’s cultural and social identity and cultural heritage”,<sup>16</sup> is it implicit in this requirement that the cultural heritage of the community be indigenous to the community and the geographic space that that community inhabits?

This point comes into sharper focus when considering the requirements of the Draft TK Instrument where “traditional knowledge” is defined as “the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning *that form part of traditional knowledge systems*, and knowledge embodying traditional lifestyles of indigenous and local communities...”<sup>17</sup> Is it that the reference to “traditional knowledge

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<sup>16</sup> The Draft TCE Instrument defines “traditional cultural expressions” as verbal, musical or tangible expressions which are

- (1) the products of creative intellectual activity, including individual and communal creativity;
- (2) characteristic of a community’s cultural and social identity and cultural heritage; and
- (3) 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.

<sup>17</sup> See **Article 3 - Subject Matter of Protection**, the full text of which reads as follows:

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.
2. For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes

systems” in the Draft TK Instrument refers to traditional knowledge systems indigenous to the geographic space that the community inhabits? If the answer to that question is yes, then many Caribbean cultural products will not qualify as “traditional knowledge” because they draw on “traditional knowledge systems” which originate from elsewhere.

The other consideration is the reliance on “custom” and a “customary context” in the Draft WIPO Instruments which may not reflect all the realities of how such knowledge evolves, and its place in contemporary society.<sup>18</sup> Traditional knowledge can exist, and is transmitted, in multiple contexts. As one writer remarked – “...no one’s life is entirely traditional and no one’s life is entirely modern....Traditional versus modern is better thought of as opposite ends of a scale...Each community fits somewhere along the scale, in some combination of modern and traditional.”<sup>19</sup> The case of the steel pan shows that knowledge may transcend its folkloric or tradition base (or its traditional/customary context), yet still be culturally significant, and have the same strong connections with its source community or country.

If concessions are made within the proposed Caribbean regional framework to account for the syncretic nature of much of the cultural products and practices that exist

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the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

<sup>18</sup> See, for example, the criteria for protection proposed in the Draft Legal Instrument for SAARC Countries on the Protection of Traditional Knowledge (the “draft SAARC Framework”) (as compared to those proposed in the Draft TK Instrument) which specifies that protection should extend to at least knowledge which is generated, preserved and transmitted in a traditional context *or through recognised courses of study of traditional medicine*.

<sup>19</sup> See Michael J. Finger, “Introduction and Overview” in J. Michael Finger and Philip Schuler, eds., *Poor People’s Knowledge. Promoting Intellectual Property in Developing Countries* (Washington, DC: The World Bank and the Oxford University Press, 2004) at pp.31-32.



in this region, and other ways of maintaining and transmitting traditional knowledge which are not governed by “custom” exclusively or at all, would that mean that those cultural products will only receive protection within the region but excluded from consideration as traditional knowledge within the wider international sphere should the Draft WIPO Instruments be adopted in their present form?

It cannot be overstated that the Caribbean needs to participate in the development of these Draft WIPO Instruments and even influence the process.

### **Policy and Legal Options**

There are essentially two policy options namely:

- (1) Protection via the ascription of rights and penalties for unauthorised use of traditional knowledge<sup>20</sup>; and
- (2) Preservation of traditional knowledge.

These two options are not mutually exclusive and may compliment each another.<sup>21</sup>

These options have been expressly recognised in the Treaty of Chaguaramas which concerns Industrial Policy, the relevant parts of which state as follows:

“The COTED [Council for Trade and Economic Development] shall promote the protection of intellectual property rights within the Community, by inter alia:

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<sup>20</sup> Note the WIPO document entitled “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles” WIPO/GRTKF/IC/7/3, Seventh Session (Geneva, November 1-5, 2004) at p.12 where it states that “the term ‘protection’ refers to protection such as that typically provided by IP laws, essentially to provide legal means to restrain third parties from undertaking certain unauthorised acts that involve the use of ...protected material. “Protection’ in this sense must be distinguished from the concepts of ‘preservation’ and ‘safeguarding’, which in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalisation and promotion of cultural heritage in order to ensure its maintenance and viability.”

<sup>21</sup> See the 2001WIPO Report, at p.193, which states that “protection and preservation cannot be clinically separated as protection by definition could contribute to preservation.”

- (c) the identification and establishment, by Member States of mechanisms to ensure:
- (ii) the preservation of indigenous Caribbean culture; and
  - (iii) the legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community”<sup>22</sup>

***Protection via the ascription of rights and/or penalties for unauthorised use of traditional knowledge***

Protection can take the form of proprietary and non-proprietary measures. Examples of the types of proprietary measures that may be adopted are:

- (i) existing IP laws such as copyright, patents, industrial designs laws, trade marks, and the law relating to geographical indications;

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<sup>22</sup> The full text of the relevant parts of Protocol III state as follows:

“The COTED shall promote the protection of intellectual property rights within the Community by, inter alia:

- (a) The strengthening of regimes for the protection of intellectual property rights and the simplification of registration procedures in Member States;
- (b) The establishment of a regional administration for patents, trademarks and copyright;
- (c) The identification and establishment, by Member States of mechanisms to ensure:
  - (i) The use of protected works and industrial property for the enhanced benefit of Member States;
  - (ii) The preservation of indigenous Caribbean culture; and
  - (iii) The legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community;
- (d) Increased dissemination and use of patent documentation as a source of technological information;
- (e) Public education;
- (f) Measures to prevent the abuse of intellectual property rights by rights-holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and
- (g) Participation by Member States in international regimes for the protection of intellectual property rights.”

(ii) *sui generis* extensions or adaptations of intellectual property rights such as the folklore provisions in the Tunis Model Law on Copyright for Developing Countries (the Tunis Model); and

(iii) specially-created *sui generis* IP measures such as the Panamanian Law No.20 of June 26, 2000 on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge (the “Panamanian Law”)

Examples of non-proprietary measures include:

- (i) Unfair competition laws;
- (ii) Equitable remunerations schemes;
- (iii) Contracts and licences;
- (iv) Customary laws and protocols;
- (v) Unjust enrichment;
- (vi) Law relating to confidential information.

The appropriate form of protection would depend on the manner in which the subject matter is defined, and the policy objectives of protection. In the Caribbean, this will

vary.<sup>23</sup> A combination of proprietary and non-proprietary measures are included in the Draft TCE Instrument – note, in particular, article 3.<sup>24</sup>

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<sup>23</sup> The diversity of subject matter to be protected was acknowledged in the following extract:  
“TCEs/EoF are necessarily diverse in their nature; they are developed and maintained by a wide range of communities, people and individuals in diverse cultural and legal contexts and in many different countries; and the needs and aspirations of relevant communities are similarly diverse. It follows that the possible means of protecting TCEs/EoF against misuse or misappropriation, and the choices actually taken, also vary widely. Many communities cherish this diversity as integral to their cultural identity”:

see “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Outline of Policy Options and Legal Mechanisms” WIPO/GRTKF/IC/7/4, Seventh Session, (Geneva, November 1 to 5, 2004) para. 8.

<sup>24</sup> **Article 3 of the Draft TCE Instrument provides as follows:**

**Acts of Misappropriation (Scope of protection)**

**Traditional cultural expressions/expressions of folklore of particular value or significance**

(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

- (i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:
  - the reproduction, publication, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;
  - any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;
  - any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
  - the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;
- (ii) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural

## ***Preservation of traditional knowledge***

“Preservation” may involve:

- (i) The documentation of traditional knowledge via the provision of registers, inventories and databases<sup>25</sup>;
- (ii) The promotion of traditional knowledge through educational initiatives

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expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

### Other traditional cultural expressions/expressions of folklore

(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:

- (i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;
- (ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanction;
- (iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and
- (iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

### Secret traditional cultural expressions/expressions of folklore

(c) There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

<sup>25</sup> The 2001 WIPO Report provides examples of documentation efforts: see p.195.

Any “preservationist strategy must be in accordance with or consonant with the way in which the traditional knowledge is maintained or transmitted. Some forms of knowledge do not lend themselves to fixation and documentation and there may be other modes of preservation<sup>26</sup> or means of valuing cultural objects that do not involve objectification and reification for the purposes of collection, observation and display.<sup>27</sup> However, the emphasis of WIPO (given its mandate) is on the development of “protection” measures.<sup>28</sup>

### **Challenges to formulating and implementing policy and devising legal mechanisms**

One of the main challenges to the formation of a policy regarding the protection/preservation of traditional knowledge *lato sensu* , is the insufficient amount of persons trained in or au fait with firstly, intellectual property (beyond copyright); secondly, the issues involved in intellectual property protection of traditional knowledge; and thirdly, in the developments at the IGC in crafting instruments for the protection of traditional knowledge. As a result, the discourse on traditional knowledge protection in

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<sup>26</sup> See Christina Kreps, “Indigenous Curation as Intangible Cultural Heritage: Thoughts on the Relevance of the 2003 UNESCO Convention” Vol.1 No.2 Theorising Cultural Heritage, at p.4 where she explores the concept of “indigenous curation” which she defines as incorporating non-western models of museums, curatorial methods, and concepts of heritage preservation which should be recognised and valued in their own right as “unique curatorial expressions and as evidence of human cultural diversity”.

<sup>27</sup> Some cultural objects are not meant to be preserved at all but subject to natural degradation over time.

<sup>28</sup> See Draft Concept Note, WIPO/GRTK/KIN/08/1, at p.5 where it states that “WIPO’s work concerns the *legal protection* of TK and TCEs, that is, their protection against unauthorised use (such as copying, adaptation and commercial use), and *not* directly their preservation or safeguarding. In some cases, however, the word ‘protection’ is used when ‘preservation’ is intended – it is necessary to be clear on the specific focus of WIPO’s work, which is in keeping with its mandate to protect creativity and innovation in all its forms.”

the Caribbean may not be as developed as it should.<sup>29</sup> The situation has improved over the years with WIPO's involvement in the Caribbean and the introduction of the teaching of intellectual property law at the undergraduate and graduate levels.<sup>30</sup>

With specific reference to the issues relating to the protection of traditional knowledge, a rudimentary survey<sup>31</sup> suggests that there are varying levels of awareness of those issues among different government and non-government organisations and other stakeholders.<sup>32</sup>

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<sup>29</sup> See the 2001 WIPO Report at p.196 where it states that "some of the lawyers with whom the WIPO delegation met acknowledged that the protection of TK has not been debated in legal circles in many Caribbean countries hence the lack of an articulate legal response to the issues raised." (Note excluded).

<sup>30</sup> At the graduate level, students are exposed to copyright and related rights, patents, issues related to domain names and e commerce, trade marks and passing off and the international intellectual property: see Telephone interview with the Ms Roshene Betton, Research Fellow and LL.M. Coordinator, Faculty of Law, University of the West Indies, Cave Hill, Barbados, 13<sup>th</sup> March , 2008.

<sup>31</sup> In order to provide a preliminary overview of the Caribbean position on the protection of traditional knowledge in general, a short questionnaire was prepared and sent to intellectual property offices and departments responsible for such matters in the region. Less than 40% of the respondents were able to complete the questionnaire given the time constraints placed on them. The questionnaire can be found in the Appendix to this paper.

<sup>32</sup> The responses to Question 4 of the questionnaire contained in the Appendix are indicated below.

**Question 4**

"How would you describe the level of awareness of issues relating to the protection of traditional knowledge among the following departments/groups

- |   |                     |  |           |
|---|---------------------|--|-----------|
| (1) Intellectual Property Office/other department responsible for intellectual property |                     |  |           |
| High  | Low                 |  | None      |
| Belize  |                     |  |           |
|   | Grenada             |  |           |
| Trinidad and Tobago   |                     |  | St. Lucia |
| (2) Other relevant government departments (Ministry of Culture, for example)            |                     |  |           |
| High  | Low                 |  | None      |
|   | Belize              |  | Grenada   |
|   | Trinidad and Tobago |  | St. Lucia |

Regarding the development of a regional framework of protection, Question 5 (1)<sup>33</sup> of the questionnaire specifically asked the respondents to indicate what, in their opinion, were the challenges to the development of such a regional framework of protection for traditional knowledge. The responses varied and included

(1) National implementation<sup>34</sup>;

(2) The varying levels of awareness of the issues among Caribbean countries<sup>35</sup>;

and

(3) The need for greater involvement in the cultural department<sup>36</sup>.

In response to Question 5 (2)<sup>37</sup>, the respondents indicated that a lack of regional legal expertise in intellectual property contributed to the challenges faced in the development of a Caribbean framework for the protection of traditional knowledge.<sup>38</sup>

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(3) Other stakeholders such as cultural groups who maintain and pass on traditions	High	Low	None
		Belize Trinidad and Tobago	Grenada St. Lucia
(4) General public	High	Low	None
		Trinidad and Tobago	Belize; Grenada St. Lucia

Positive responses were received from Belize, Grenada, St. Lucia, and Trinidad and Tobago.

<sup>33</sup> See Appendix.

<sup>34</sup> Belize.

<sup>35</sup> Grenada.

<sup>36</sup> St. Lucia.

<sup>37</sup> See Appendix.

<sup>38</sup> Belize and Grenada.



One of the respondents indicated that persons involved in the cultural department (apart from those with legal expertise) could make invaluable contributions and maybe there could be further development of expertise in that area.<sup>39</sup>

Question 5(3)<sup>40</sup> asked whether a lack of awareness of the international debate on the protection of traditional knowledge contributed to the challenges faced in developing a regional framework of protection for traditional knowledge. All respondents indicated that it did.<sup>41</sup>

### **The way forward**

In charting the way forward, the followings courses of action are suggested:

1. There should be a regional Fact-finding mission to supplement and enhance the mission conducted by WIPO in 1999 (almost nine (9) years ago).<sup>42</sup> That mission should incorporate all Caricom countries.

As part of that exercise, countries should be asked to (i) offer their definitions of traditional knowledge; and (ii) identify the most significant forms of traditional knowledge in their country. The latter could act as a catalyst for action and add a more practical dimension to what may be an abstract exercise. In this regard, specific case studies could be done in relation to those forms of traditional

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<sup>39</sup> St. Lucia.

<sup>40</sup> See Appendix.

<sup>41</sup> Belize, Grenada, and St. Lucia.

<sup>42</sup> This accords with a suggestion made in the Draft Concept Note, at p.12.

knowledge as well as those shared by more than one territory, for example, there are variations of the Pierrot Grenade costume in Trinidad and Tobago Carnival, Shakespeare Mas in Carriacou and Jonkunnu in the Bahamas.

2. Instances of unauthorised use or appropriation of traditional knowledge should be documented.<sup>43</sup>
3. An educational programme should precede any “new” fact-finding mission to sensitise government and non-governmental personnel and organisations about the relevant laws, the issues, and the international debate concerning the expansion of intellectual property rights and the protection of traditional knowledge.
4. An audit should be taken of the following: (i) legal and non-legal regional expertise; (ii) existing legislation which offers protection for traditional knowledge; and (iii) any proposed legislation for the protection of traditional knowledge.
5. A system should be devised to facilitate the easy access to information and the sharing of information so that information as basic as the contact names and addresses for persons responsible for intellectual property matters in the various Caribbean territories, to information regarding specific forms of traditional knowledge and any initiatives concerning their protection/preservation, could be accessible to regional consultants. This may involve establishing a unit (virtual or otherwise) from which and through which information can be received and disseminated.

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<sup>43</sup> See Draft Concept Note, at p.12.

## APPENDIX

Dear Sir/Madam

**Re: Establishment of a Caribbean Framework for the Protection of Traditional Knowledge, Folklore, and Genetic Resources**

I am a Caricom national and a Ph.D. candidate at the University of Cambridge, United Kingdom. My doctoral thesis explores issues of intellectual property, traditional knowledge and cultural property in the context of the issue of protecting the steel pan of Trinidad and Tobago.

I have been asked by the World Intellectual Property Organisation (WIPO) to present a paper entitled “Protecting Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources: Policy and Legal Challenges for Caribbean Countries” at a Regional Expert meeting to be held in Jamaica on March 18-19<sup>th</sup>, 2008, organised by WIPO in cooperation with the Ministry of Science and Technology, and the Jamaica Intellectual Property Office.

In order to provide a preliminary overview of the Caribbean position on the protection of traditional knowledge in general, I require your assistance in the completion of the questionnaire which follows:

**Question 1:**

What legislation, if any, presently exists in your country concerning the protection of the following:

- (1) Traditional knowledge;
- (2) Folklore or traditional cultural expressions;
- (3) Genetic Resources

**Question 2:**

- (1) Is a distinction made between “traditional knowledge” and “folklore” in your country?<sup>44</sup>
- (2) What constitutes traditional knowledge and/or folklore in your country?<sup>45</sup>
- (3) What, in your opinion, is/are the most significant form of forms of traditional knowledge and/or folklore in your country which should be protected. (Protection in this context, refers to legal protection from commercial and other forms of exploitation or reproduction without prior authorisation).

**Question 3**

- (1) Does a representative from your office, other government department or non-governmental organisation attend meetings of the WIPO Intergovernmental

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<sup>44</sup> The term “traditional knowledge” sometimes refers to “technical” know-how and knowledge associated with, *inter alia*, biodiversity conservation, agriculture, medicine and genetic resources. “Folklore” or “traditional cultural expressions” tends to refer to artistic expressions such as stories, music, paintings, etc. WIPO makes use of the term “traditional knowledge” as a specific term, *stricto sensu* and as a general term, *lato sensu*. Traditional knowledge *stricto sensu* is understood to refer to “technical” know-how and knowledge related to or associated with, *inter alia*, biodiversity conservation, agriculture, medicine and genetic resources. Traditional knowledge *lato sensu* is used in a broader sense to refer to both technical know-how, knowledge, and also folklore/traditional expressions and manifestations of cultures in the form of music, stories, paintings, handicrafts, languages and symbols, performances and the like, falling under the rubric traditional cultural expressions or expressions of folklore: see “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore” WIPO Publication No.785(E) at p.27.

<sup>45</sup> For your information, I have included an extract from the 2001 WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) concerning the subject matter which constitutes “traditional knowledge” in the Caribbean. I have also included the definitions used in the recent Draft WIPO treaties referred to in **Question 3** for your consideration. I have included both extracts in an Appendix to this letter.

Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC Meetings)?

- (2) Are you familiar with the draft traditional knowledge treaties which are being developed by WIPO, namely, (i) the “Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore” (the Draft TCET), and the “Draft Provisions for the Protection of Traditional Knowledge” (the Draft TKT)?

Describe your familiarity with the draft treaties in terms of the following:

High                      Low                      None

#### **Question 4**

How would you describe the level of awareness of issues relating to the protection of traditional knowledge among the following departments/groups:

- (1) Intellectual Property Office/other department responsible for intellectual property

High                      Low                      None

- (2) Other relevant government departments (Ministry of Culture, for example)

High                      Low                      None

- (3) Other stakeholders such as cultural groups who maintain and pass on traditions

High                      Low                      None

- (4) General public

High

Low

None

**Question 5**

- (1) What do you think are the challenges to the development of a regional framework of protection for traditional knowledge?
- (2) Does a lack of legal expertise in intellectual property law contribute to the challenges faced in the development of a Caribbean framework for the protection of traditional knowledge?
- (3) Does a lack of awareness of the international debate on the protection of traditional knowledge contribute to the challenges to the development of a regional framework for the protection of traditional knowledge?

**Responses may be sent via email (preferably), or by fax.**

I will appreciate a timely response, preferably by March 14<sup>th</sup>, 2008, if possible. I apologise for the time constraints placed on this exercise but the ambit of the paper was only recently conveyed to me by WIPO.

Thank you for your kind cooperation and I look forward to seeing you at the meeting.

Yours faithfully

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Sharon Le Gall

**APPENDIX**  
**Fact-finding Mission to the Caribbean Region**  
**Trinidad and Tobago, Guyana, Jamaica**  
**May 30<sup>th</sup> – June 9<sup>th</sup>, 1999**

The subject matter identified as constituting “traditional knowledge” includes

- Traditional usage of fruits, plants and animals for medicinal purposes;
- Spiritual healing;
- Traditional fishing methods;
- Traditional birthing methods;
- Traditional bone setting techniques;
- Cultural heritage;
- Folksongs, dances and dramas;
- Rites and rituals;
- Traditional psychiatry;
- Religion;
- Trapping, hunting and fishing techniques;
- Traditional food culture and preservations techniques;
- Handicrafts;
- Traditional environmental preservation and conservation methods;
- Language.

# Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (the Draft TCET)

## Article 1

### Subject Matter of Protection

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,

whether or not reduced to a material form; and

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

which are



(aa) the products of creative intellectual activity, including individual and communal creativity;

(bb) characteristic of a community's cultural and social identity and cultural heritage; and

(cc) 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.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

## **Draft Provisions for the Protection of Traditional Knowledge (the Draft TKT)**

### **Article 3**

#### **Subject Matter of Protection**

1. These principles concern protection of traditional knowledge against
2. For the purpose of these principles only, the term "traditional knowledge" refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not

limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.