

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

Twenty-Fifth Session
Geneva, July 15 to 24, 2013

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT ARTICLES

Document prepared by the Secretariat

1. At the Twenty-Fifth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is taking place from July 15 to 24, 2013, the Committee developed, on the basis of document WIPO/GRTKF/IC/25/4, a further text, "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2". The Committee decided that this text, as at the close of Agenda item 6 in document WIPO/GRTKF/IC/25/1 Prov. 2, on July 19, 2013, be transmitted to the WIPO General Assembly taking place in September 2013, in accordance with the Committee's mandate contained in document WO/GA/40/7 and the work program for 2013 as contained in document WO/GA/41/18.

2. The text "The Protection of Traditional Knowledge: Draft Articles Rev. 2", as at the close of the Agenda item 6 in document WIPO/GRTKF/IC/25/1 Prov. 2, is annexed to the present document.

3. *The Committee is invited to take note of the document contained in the Annex, in accordance with the Committee's mandate contained in document WO/GA/40/7 and work program for 2013 as contained in document WO/GA/41/18.*

[Annex follows]

The Protection of Traditional Cultural Expressions: Draft Articles

Rev. 2

OBJECTIVES

1. To provide Indigenous [Peoples] and [local communities] [and nations] / [beneficiaries] with the [legal and practical/appropriate] means, [including effective and accessible enforcement measures/sanctions, remedies and exercise of rights], to:

[1 alt. To provide beneficiaries with the appropriate measures, which may include legal and practical means, to:]

- a. [prevent] the [misappropriation and misuse/offensive and derogatory use] of their traditional cultural expressions [and adaptations thereof]; and
- b. control ways in which their traditional cultural expressions [and adaptations thereof] are used beyond the traditional and customary context [and promote the equitable sharing of benefits arising from their use], as necessary.

2. [To [prevent/preclude] the [grant], exercise and [enforcement] of intellectual property rights [acquired by unauthorized parties/inappropriately acquired] over traditional cultural expressions [and their adaptations]].

3. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the free, prior and informed consent of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]

4. To protect/safeguard [and reward] [tradition-based] creativity [[and innovation] based on the traditional cultural expressions of Indigenous [Peoples] and [local communities] and nations / beneficiaries].

[4. alt. To protect and reward creativity and innovation by Indigenous Peoples and [local communities] for their traditional cultural expressions.]

[5. To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]

[Principles / Objectives:] / [Preamble]

[6. [Recognizing]/[to recognize] that the cultural heritage of Indigenous [Peoples], [local communities] [and nations] / beneficiaries has intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.

7. [Being]/[to be] guided by the aspirations [and expectations] expressed directly by Indigenous [Peoples], [local communities] [and nations] / beneficiaries, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples], communities [and nations] / beneficiaries.

8. [Acknowledging]/[to acknowledge] that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities] [and nations] / beneficiaries, as well as all humanity.

9. [Recognizing]/[to recognize] the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the Indigenous [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.

10. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.

11. [Contributing]/[to contribute] to the promotion and protection of the diversity of traditional cultural expressions, [and the rights of beneficiaries over their traditional cultural expressions].
12. [Recognizing]/[to recognize] the importance of preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.
13. [Recognizing]/[to recognize] the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous [Peoples], [local communities] [and nations] / beneficiaries, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.]

[ARTICLE 1]

SUBJECT MATTER OF PROTECTION

Option 1

Definition of Traditional Cultural Expressions

1. Traditional cultural expressions are any form of [artistic and literary] expression, tangible and/or intangible, or a combination thereof,

Alternative 1: in which traditional culture [and knowledge] are [embodied]

Alternative 2: which are [indicative] of traditional culture [and knowledge]

which is intergenerational⁵/from generation to generation and between generations, including, but not limited to: phonetic and verbal expressions¹, [musical and sound expressions]², [expressions by action]³, tangible expressions⁴, [and adaptations of these expressions].

Criteria for Eligibility

2. Protection extends to traditional cultural expressions that are:

(a) [the result of the creative intellectual activity] of; [and/or]

(b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of; [and/or]

(c) [held], maintained, used and/or developed as part of the cultural or social identity [or heritage] of the beneficiaries as defined in Article 2.

3. The terminology used to describe the protected subject matter shall/should be determined in accordance with national law and, where applicable, regional law.

[Option 2

1. For the purposes of this instrument, “traditional cultural expressions” include any form of [creative and other spiritual] expressions, tangible or intangible, or a combination thereof, such as phonetic and verbal¹, musical and sound², actions³, tangibles and materials⁴ [and their adaptations] regardless of the form in which it is expressed, illustrated or embodied and are:

a) intergenerational⁵ and/or passed on from generation to generation;

b) distinctive to or associated with the traditional culture, knowledge, or heritage of the beneficiaries; and

c) maintained, used or developed as part of their collective culture or social identity.

2. The terminology used to describe the protected subject matter may be determined in accordance with national law and, where applicable, regional law.]

¹ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

² [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

³ [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

⁴ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

⁵ Intergenerational includes being passed on from generation to generation or between generations.

[ARTICLE 2]

BENEFICIARIES OF PROTECTION

Option 1

1. [Indigenous [Peoples] or [local communities] [or nations] who [hold, maintain, use [and/or] develop their traditional cultural expressions as part of their collective cultural or social identity] are the beneficiaries of protection in respect of those traditional cultural expressions as defined in Article 1 [or an entity defined by national legislation as a beneficiary].]
2. [Where a traditional cultural expression is not specifically attributable or confined to an/the Indigenous [People] or [local community] that [holds, maintains, uses [and/or] develops it] [and/or] it is not possible to [identify] the Indigenous [People] or [local community] that holds, maintains, uses or develops it, [Member States]/[Contracting Parties] may define [a]/[any] national entity as a beneficiary by national legislation.]

Option 2

- [1. Beneficiaries of protection of traditional cultural expressions as defined in Article 1 are Indigenous [Peoples] and [local communities], or as determined by national law.
2. Where traditional cultural expressions as defined in Article 1 are not specifically attributable or confined to an/the indigenous [people] or [local community], or it is not possible to identify the [indigenous people] or community that generated it, Contracting Parties may define any national entity defined by national legislation as a beneficiary.]

[ARTICLE 3]

SCOPE OF PROTECTION

[Option 1

The economic and moral interests of the beneficiaries concerning their traditional cultural expressions, as defined in Articles 1 and 2, shall/should be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.]

[Option 2

Adequate and effective legal, administrative or policy measures shall be provided to safeguard the economic and moral interests of the beneficiaries, including but not limited to:

- (a) have exclusive and inalienable collective rights to authorize and prohibit the use⁶ and exploitation of traditional cultural expressions by others;
- (b) prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions;
- (c) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
- (d) prevent use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;
- (e) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

⁶ Use includes: fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution; any use for commercial purposes, other than their traditional use; and the acquisition or exercise of intellectual property rights.

[ARTICLE 4

ADMINISTRATION OF RIGHTS/INTERESTS

Option 1 (merger of existing options)

1. Where so requested by the beneficiaries,

Alternative 1: a competent authority (regional, national or local)

Alternative 2: a national competent authority

may, to the extent authorized by the beneficiaries, and in accordance with:

Alternative 1: the traditional-decision-making and governance processes of the beneficiaries

Alternative 2: customary protocols, understandings, laws and practices

Alternative 3: national law

Alternative 4: national procedure

Alternative 5: international law

carry out the following functions (but need not be limited to such functions):

- (a) conduct awareness-raising, education, advice and guidance functions;
- (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
- (c) grant licenses;
- (d) collect monetary or non-monetary benefits from the use of the traditional cultural expressions and provide them to the beneficiaries [for the preservation of traditional cultural expressions];
- (e) establish the criteria to determine any monetary or non-monetary benefits;
- (f) provide assistance in any negotiations for the use of the traditional cultural expressions and in capacity building;
- (g) [If determined by national law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights in relation to a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to a community]

[2. The management of the financial aspects of the rights shall/should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries].

Option 2 (short option)

Where so requested by the beneficiaries, a competent authority may, to the extent authorized by the beneficiaries and for their direct benefit, assist with the management of the beneficiaries' rights/interests under this [instrument].]

[ARTICLE 5]

EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions shall/should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the contracting parties/member States/members where applicable].
2. Limitations on protection shall/should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional [or] cultural context.
3. Contracting parties/Member States/Members may adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:
 - (a) are limited to certain special cases;
 - (b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]
 - (c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]
 - (d) [ensure that the [use] of traditional cultural expressions:
 - i. is not offensive or derogatory to the beneficiaries;
 - ii. acknowledges the beneficiaries, where possible;] and
 - iii. [is compatible with fair practice.]]]
4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following shall/should be permitted [only with the free prior and informed consent of the beneficiaries]:
 - (a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education;
 - (b) [the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions].
5. [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall/should not be prohibited by the protection of traditional cultural expressions].

ARTICLE 6
TERM OF PROTECTION

Option 1

1. Protection of traditional cultural expressions shall/should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,

2. The protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, shall/should last indefinitely.

Option 2

At least as regards the economic aspects of traditional cultural expressions, their protection shall/should be limited in time.

ARTICLE 7
FORMALITIES

[As a general principle], the protection of traditional cultural expressions shall/should not be subject to any formality.

[ARTICLE 8
SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS

1. (Option 1): Appropriate measures shall/should be provided, in accordance with national law, to ensure the application of this instrument, including legal, policy or administrative measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent.

1. (Option 2): Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies including criminal and civil remedies, shall/should be available in cases of breach of the protection for traditional cultural expressions.

2. The means of redress for safeguarding the protection granted by this instrument shall/should be governed by the national law of the country where the protection is claimed.

3. [Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall/should be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.⁷]

⁷ Such as the WIPO Arbitration and Mediation Center.

[ARTICLE 9

TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into effect/force, fulfill the criteria set out in Article 1.

Option 1

2. The state shall/should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties.

Option 2

2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, shall/should be brought into conformity with the provisions within a reasonable period of time after they enter into effect/force, subject to respect for rights previously acquired by third parties qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall/should have the right to recover such traditional cultural expressions.]

[ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Wild card (merger of Options 1 and 2)

Protection under this instrument shall/should take account of, and operate consistently with, other international instruments, including those dealing with intellectual property and with cultural heritage.]

[ARTICLE 11

NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national measures or laws that give effect to these international provisions shall/should be available to all eligible beneficiaries who are nationals or residents of a prescribed country/contracting party/member State/member as defined by international obligations or undertakings. Eligible foreign beneficiaries shall/should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country/contracting party/member State/member of protection, as well as the rights and benefits specifically granted by these international provisions.]

[ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional cultural expressions are located in territories of different contracting parties/member States/members, those contracting parties/member States/members shall/should co-operate in addressing instances of trans-boundary traditional cultural expressions.]

[End of Annex and of Document]