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TRADITIONAL KNOWLEDGE AND FOLKLORE**

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TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE
LEGAL AND POLICY OPTIONS

Document prepared by the Secretariat

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SUMMARY

1. This document reviews the substantive aspects of the legal protection of expressions of folklore (EoF)/traditional cultural expressions (TCEs), including the legal and policy options that are available at the level of national law and in relevant international standards. It aims to facilitate further consideration of the material on this subject that has already been put before the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee'), and includes new material to take account of comments made on the main working document on this topic considered at the Committee's Fifth Session (document WIPO/GRTKF/IC/5/3).
2. The Committee has already considered diverse approaches to protecting EoF/TCEs through the intellectual property (IP) system. Many Committee participants have observed that no single solution is likely to meet all the needs of indigenous and traditional communities and to protect EoF/TCEs in a comprehensive manner. Instead, effective and comprehensive protection may be found in a 'menu' of options, comprising differentiated and multiple levels and forms of protection. Clarifying and distilling these options is the main thrust of this paper.
3. The options include existing intellectual property systems (including unfair competition), adapted IP rights (*sui generis* aspects of IP systems), and new, stand-alone *sui generis* systems, as well as non-IP options, such as trade practices and labeling laws, use of contracts, customary and indigenous laws and protocols, cultural heritage preservation laws and programs, common law remedies such as unjust enrichment, rights of publicity, blasphemy, and criminal law. Not all of these potentially useful options are necessarily discussed in the same amount of detail in this document, however. The options discussed in this document are either already in use in national or regional systems or have been discussed in Committee sessions or other WIPO activities.
4. From the point of view of indigenous and traditional communities, the protection of EoF/TCEs and of technical traditional knowledge (TK) may be closely related. Some national and regional legal instruments aim to protect both EoF/TCEs and TK. However, in line with the practice of the Committee, this document deals specifically with the protection of EoF/TCEs. Document WIPO/GRTKF/IC/6/4 deals with TK in a complementary fashion.
5. The substantive protection of EoF/TCEs necessarily involves consideration of the applicable principles and standards that are established at the international level – for instance, the WIPO Performances and Phonograms Treaty (WPPT) requires protection of performances of EoF. These standards are discussed as appropriate in this document. The complementary document WIPO/GRTKF/IC/6/6 provides a comprehensive discussion of the international dimension of the protection of EoF/TCEs, together with the international dimension of TK protection.

6. To clarify options and to give the discussion a practical and applied focus, four main subjects and forms of protection are considered (based closely upon the kinds of appropriations of EoF/TCEs that Committee participants and other stakeholders most often refer to). These are:

- (i) protection of traditional literary and artistic productions against unauthorized reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and/or culturally and spiritually offensive uses;
- (ii) protection of handicrafts, particularly their 'style' (taking into account the emphasis many countries place on the protection of handicrafts);
- (iii) prevention of false and misleading claims to authenticity and origin/failure to acknowledge source; and
- (iv) defensive protection of traditional signs and symbols.

7. The document suggests that the evaluation and choice of policy options within any national strategy for the protection of EoF/TCEs should be based on a key first step: identifying overall policy objectives, taking fully into account the needs of indigenous and traditional communities and relevant legal and cultural policy issues.

8. Once the overall objectives for protection have been set, developing a national strategy or system of protection could be built on the assessment of a series of specific policy and legal options (discussed in Section IV), corresponding to the four main subjects and forms of protection identified above. The legal and policy options can be briefly summarized as follows:

(a) *Traditional literary and artistic productions:*

Some countries may decide that the protection afforded to contemporary adaptations, derivations and performances of EoF/TCEs is adequate. In other cases, countries may consider, based on national policy objectives, that IP-type protection is warranted for EoF/TCEs that are currently unprotected. These countries may need to address the following issues and possible options, amongst others (based upon actual experiences to date):

- (i) *Criteria for protection:* issues include whether or not to require 'originality' and 'fixation' as criteria for protection, and whether eligible EoF/TCEs should be 'capable of commercial use,' 'traditional' and/or 'based on tradition.'
- (ii) *Communal/collective rights:* options could include statutory recognition of 'collective rights,' introduction of communal moral rights and the vesting of rights in a new or existing State-appointed authority or office, such as the copyright office. A related option is the use of copyright collective management systems.
- (iii) *Copyright of individuals:* the issue is how best to integrate and balance protection of communal rights in EoF/TCEs with the copyright and other IP rights of individual creators of derivative works. For example, an option could be to regulate the exercise of such IP rights in favor of the community and with respect for its values.
- (iv) *Nature of rights:* a choice could be made as to whether exclusive rights or rights to equitable remuneration (compulsory licenses) would be the more appropriate.
- (v) *Rights granted:* these could include typical economic and moral rights granted by copyright law. A particular choice may be needed as to whether or not to grant an

adaptation right. A further option is to provide rights and remedies for the failure of a user of an expression of folklore/traditional culture to acknowledge source.

(vi) *Exceptions and limitations:* options could include the typical exceptions and limitations found in most copyright laws. States may wish, however, to limit some of those exceptions where they may allow uses of TCEs that are contrary to cultural and spiritual values. Options also include specific *sui generis* exceptions, such as exemptions for: traditional or customary uses of TCEs and/or uses without gainful intent; uses by folkloric dance groups and small scale non-indigenous artisans; uses by nationals as opposed to non-nationals; and, uses by public entities for non-commercial purposes.

(vii) *Procedures and formalities:* a key choice for States is whether or not to provide for automatic protection or for some form of registration.

(viii) *Sanctions and remedies:* communities call for recognition of non-economic and spiritual harm that may be caused by illicit uses of TCEs. An option for States could be to provide statutory means for recognizing such non-economic and spiritual harm in appropriate cases.

(ix) *Time period of protection:* a choice lies between unlimited protection, or protection with a well-defined term. If States wish to provide indefinite protection, options could include: legislation simply providing for indefinite protection or making no mention of any time limit; protection could be unlimited in time in so far as existing TCEs go, but be limited for some time period in the future; the period of protection could be linked to the lifespan of a particular community or tradition that the TCE is identified with or to continuing use of the TCE by the relevant community. Some proposals for protection may aim to have retrospective effect, which raises questions about legitimate interests of third parties.

(x) *Folklore shared within a country and 'regional folklore':* options could include: co-ownership of rights; allowing communities separately to hold rights in the same or similar TCEs; vesting rights in the State or statutory body. Dispute resolution could include references to customary laws and practices. Regarding 'regional folklore' in particular, options include national and/or international folklore databases, alternative dispute resolution (ADR), systems of registration and notification, collective management and the establishment of dispute resolution organizations. Existing regional organizations and mechanisms could be helpful.

(xi) *Performances of traditional literary and artistic productions:* the WPPT, 1996 already provides international protection for performances of 'expressions of folklore.' States which have not yet done so could implement this protection.

(xii) *Documentation:* the documentation and recording of traditional literary and artistic productions for IP protection purposes (as opposed to preservation purposes) seems to stand in contradiction to the oral and 'living' nature of cultural materials. And, copyright in the documentation, recordings and databases may not vest in the relevant communities. Care should be taken, therefore, whether documentation/recording of folklore is useful as an IP strategy. Software and digital rights management tools, and evolving protection of databases, may be useful options. Cultural heritage inventories and registers could also help identify traditional owners and applicable customary laws for IP purposes.

(xiii) *Prevention of insulting, derogatory and culturally/spiritually offensive uses:* options include communal moral rights, and establishing a register in which communities could record TCEs that they themselves do not wish to be used commercially or as part of any IP subject matter.

(b) *Protection against imitation*

For protection against the imitation of the ‘style’ of handicrafts and other TCEs, the options include basing protection on laws governing unfair competition and trade practices, or exploring approaches based upon unfair competition principles.

(c) *Protecting authenticity and origin*

To protect against misleading claims as to authenticity and/or origin and source, the options include encouraging communities to register certification trademarks, exploring possibilities under trade practices and labeling laws, exploring the use of geographical indications by communities, promoting use of unfair competition laws, and developing systems based upon unfair competition principles.

(d) *Defensive protection of traditional signs and symbols*

To protect traditional signs and symbols, the options include specific legislation or legislative amendments to prevent or regulate the granting of trademark rights over traditional symbols and the development of registers and databases in which communities could register words, names, symbols and signs that they would not wish form part of a registered trademark.

Background concepts

9. In providing background to the discussion of the options, the document begins with information on the key concepts of ‘traditional cultural expressions/expressions of folklore’ and ‘intellectual property protection,’ particularly copyright protection (Section II) and the legal and cultural issues that States could take into account in constructing an appropriate policy framework for the protection of EoF/TCEs (Section III).

Practical steps

10. The document sets out certain practical steps that policy makers, legislators, communities and other stakeholders may wish to go through when navigating through the various concepts, policy issues and options relevant to protection of EoF/TCEs (Section V).

I. INTRODUCTION

Background

11. Document WIPO/GRTKF/IC/5/3 was the main working document on the protection traditional cultural expressions/expressions of folklore (EoF/TCEs) considered by the Committee at its Fifth Session. This document invited the Committee to, amongst other things, ‘provide directions for further work . . . including the possibility of the development of an annotated menu of policy options to provide practical support for TCE protection and to serve as the basis for development of recommendations or guidelines.’¹ The Committee took

¹ Para. 34.

no formal decision in this respect, but several States and observers supported the development of such a menu of options.² In addition, the WIPO General Assembly has indicated that the Committee's mandate for the 2004-05 biennium excludes no outcome, including 'the possible development of an international instrument or instruments.'

12. Following the substantive discussions at the Committee's Fifth Session and the setting of the Committee's new mandate, this document distills and summarizes document WIPO/GRTKF/IC/5/3. In view of issues raised at the Committee's Fifth Session, this document provides new information on characteristics of EoF/TCEs, and salient features of the copyright system. It also draws on other reports, working documents, studies and presentations on EoF/TCEs considered so far by the Committee. These reports, documents and other materials are listed in Annex A and are available for fuller background information and detail. The table of *sui generis* systems in document WIPO/GRTKF/IC/5/INF 3 remains a complementary reference tool, as do the presentations made at the Committee's Fourth Session (documents WIPO/GRTKF/IC/4/INF 2 to 5Add.)

13. The document does not seek to place limits on the parameters of the debate concerning TCEs protection, nor to prescribe any particular outcomes or solutions or the form that they may take.

Structure of the document

14. This document is structured as follows:

(i) Section II identifies and discusses key concepts.

(ii) Section III discusses legal and cultural policy questions relevant to the protection of EoF/TCEs.

(iii) Section IV sets out a range of options for their protection and drawing upon actual experiences to date, applies the options to several practical examples to illustrate how the options have been used so far in practice and how several options may need to interact to provide the desired for protection. Particular issues of principle or legal choice that States may wish to consider when establishing systems for the protection of EoF/TCEs are identified in text boxes.

(iv) Section V sets out practical steps that policy makers, legislators, communities and other stakeholders may wish to go through when 'navigating' their way through the various concepts, policy issues and options relevant to the protection of EoF/TCEs.

(v) Section VI sets out conclusions and a decision paragraph.

The terms 'traditional cultural expressions'/'expressions of folklore'

15. 'Traditional cultural expressions' has been used as a neutral working term in Committee documents because in some countries, cultures and communities the term 'folklore' is regarded as derogatory. However, some participants in the Committee's Fifth Session expressed concern at the use of the term 'traditional cultural expressions,' and stated their preference for the term 'expressions of folklore.' This latter term has been used in earlier

² European Community and its Member States, Norway, New Zealand, United States of America, Venezuela.

international IP discussions in this area and is the term used in the Model Provisions and in many national laws.

16. Accordingly, the terms ‘traditional cultural expressions’ and ‘expressions of folklore’ are both used together or interchangeably in this document and are regarded for present purposes as synonymous. The acronyms ‘EoF’ and ‘TCEs’ refer to both expressions of folklore and traditional cultural expressions.

17. The use of ‘traditional cultural expressions’ or ‘expressions of folklore’ in this document is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms. As many States and communities point out, the choice of an appropriate term or terms, and the identification of the subject matter that it/they cover, is ultimately a matter for decision by policymakers and relevant communities at the local and national levels. The use of the term ‘traditional cultural expressions’ in this document does not affect or limit the use of other terms in national laws.

Sui generis systems

18. Previous Committee documents have discussed the various *sui generis* systems which have already been established at national or regional levels for the protection of EoF/TCEs. Several of these are summarized in document WIPO/GRTKF/IC/5/INF/3, and are analyzed in the present document, in particular:

- (i) the Tunis Model Law on Copyright for Developing Countries, 1976 (‘the Tunis Model Law’);
- (ii) the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (‘the Model Provisions’);
- (iii) the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999 (‘the Bangui Agreement’);
- (iv) the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 (‘the Panama Law’);
- (v) the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (‘the Pacific Regional Framework’);
- (vi) the Indigenous Peoples Rights Act of 1997 of the Philippines (‘the Philippines Law’); and
- (vii) the Indian Arts and Crafts Act, 1990 of the United States of America. Although this is not strictly speaking an IP system, it illustrates the kind of trade practices and consumer protection law that can play an important part in meeting many of the needs of indigenous and traditional communities in relation to safeguarding the authenticity of their arts and crafts against false and misleading labeling and marketing practices.³

³ At the Fifth Session of the Committee, the Delegation of the U.S.A. made a presentation on the Act - see WIPO/GRTKF/IC/5/INF/4.

Customary and indigenous laws

19. Several Member States⁴ and many Indigenous peoples and cultural communities embodying customary legal systems have argued for greater recognition and use of customary laws and protocols in the formulation of approaches and systems for the protection of EoF/TCEs (as well as technical TK). Such recognition and use could include, for example:

(i) The full application of customary laws to all questions concerning the acquisition, maintenance and enforcement of rights in TCEs, including by external parties, and disputes arising therefrom (disputes could, for example, be referred to and addressed solely by indigenous or tribal authorities, courts, customary institutions and other such fora).

(ii) Internalizing as far as possible customary laws in IP systems for the protection of TCEs by, for example, referring to customary laws when interpreting and applying IP laws for the protection of TCEs, in order to resolve certain questions of law and/or fact (for example, a TCE law might grant certain rights to ‘traditional owners.’ Customary laws could be referred to determine their identity and resolve conflicts between competing claimants). This is an approach followed so far in existing *sui generis* systems for TCE protection which refer to customary law.

(iii) Engendering greater respect for indigenous and customary laws within communities, particularly their younger members. Ignorance of customary laws and practices governing indigenous knowledge systems and artistic expressions is seen in some cases as a significant threat to their continued maintenance, development and protection. Greater adherence to customary laws within communities could enhance their recognition and effectiveness internally and also *vis-à-vis* external parties.

(iv) Examining clashes between customary laws and conventional IP laws, and seeking to eliminate or manage those in ways sensitive to customary rights and responsibilities (for example, granting a community rights, in addition to the author’s right, to seek redress against a person infringing the copyright in a copyright-protected TCE incorporating pre-existing material subject to collective customary rights and responsibilities).

20. Some of these options overlap and they are not mutually exclusive. Recognition of customary law raises complex and sensitive legal, cultural and political questions. Among the legal questions are issues of private international law and overlaps between customary laws and conventional IP laws (for example, conflicting customary laws and IP laws could apply simultaneously to the same subject matter). On a political level, the recognition of Indigenous and customary laws in any given jurisdiction links to issues of the recognition of historical collective and cultural rights of Indigenous peoples and cultural communities embodying customary systems and the extent to which pluri-culturalism, including legal pluralism, may be accepted. More practically, it raises questions of the application of customary law beyond its traditional reach: how would customary systems apply to non-community members not subject to them? How would customary systems, local by definition, be recognized and applied as part of regional and international protection systems?

⁴ See *inter alia* Asian Group (WIPO/GRTKF/IC/1/13, para. 22), African Group (WIPO/GRTKF/IC/3/15).

21. The Committee has approved the undertaking of ‘a case study on customary laws and protocols of an indigenous or local community relevant to the protection of expressions of folklore, specifically addressing their relationship with and conclusions relevant for the formal intellectual property system.’⁵ Some of the issues and questions identified above are the subject of this study which is in its early planning stages.

Legal/conceptual and practical/operational questions

22. As the Committee’s work has clearly demonstrated⁶, the establishment of effective systems for TCE protection poses both legal/conceptual and operational/ practical challenges. Legal/conceptual substantive issues are the primary focus of this document.

Operational/practical issues would include, for example, awareness-raising, outreach and access programs, and capacity-building among TCE custodians so that they are better able to appreciate their IP-related options and take advantage of them. There is a close relationship between the legal/conceptual and operational/ practical dimensions and they need to interact and complement each other.

23. Previous documents have discussed various ideas for improving the accessibility to and practical use and enforceability of systems for TCEs protection.⁷

Practical Guide

24. It is recalled that, as mandated by the Committee, a ‘Practical Guide’ on the protection of TCEs is under preparation. It will draw extensively upon this document and previous documents, especially WIPO/GRTKF/IC/5/3, as well as comments on this document.

II. CONCEPTUAL ISSUES

25. This section discusses the two central concepts of ‘traditional cultural expressions/ expressions of folklore’ and ‘intellectual property.’

The subject matter of protection

26. Previous documents have discussed the nature of traditional cultural expressions/ expressions of folklore,⁸ and pointed out that they may be tangible or intangible, or any combination of both, as the Delegation of the Islamic Republic of Iran has pointed out.⁹

27. Earlier documents have also addressed linkages between expressions of traditional cultures/folklore and technical traditional knowledge and know-how (TK) and associated genetic resources.¹⁰ For purposes of IP discussions, expressions of traditional

⁵ See WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/3/17.

⁶ See, for example, the results of the WIPO Questionnaire of 2001, reported on in ‘Final Report on National Experiences with the Legal Protection of Expressions of Folklore’ (WIPO document WIPO/GRTKF/IC/3/10).

⁷ See WIPO/GRTKF/IC/5/3.

⁸ See WIPO/GRTKF/IC/5/3.

⁹ WIPO/GRTKF/IC/5/15, par. 36.

¹⁰ *Ibid.*, paras. 61 to 68.

cultures/folklore are and have been generally discussed distinctly. This is not to distinguish artificially between forms of knowledge and expressions that may be closely related, or to suggest that laws and systems of protection could not or should not address both folklore and TK. However, distinct consideration of folklore (as opposed to subsuming folklore within consideration of technical TK) is preferable because the IP protection of folklore and other cultural materials raises certain specific questions of cultural policy and involves legal principles closest to those underpinning the copyright and related rights systems. Therefore, even if a law addresses both folklore and TK, it has been seen as important that the forms of protection provided for folklore (such as the rights granted and the exceptions to them) be inspired and shaped by the appropriate and relevant legal and cultural policies and principles. In addition, a distinct focus engages more fully the perspectives of relevant stakeholders, such as Government offices and departments dealing with copyright, culture and education; indigenous and traditional bearers and performers of cultural traditions and artistic expressions; and folklorists, ethnomusicologists, archivists and other cultural scholars. There is also already significant experience at the international, regional and national levels on the relationship between IP and the specific issue of folklore.

'Contemporary' expressions of traditional cultures/folklore

28. Previous documents highlight the distinction made by copyright and other IP laws between contemporary expressions, adaptations and interpretations of traditional cultures and folklore (which are often protected by copyright, industrial designs and other IP laws) and other expressions of traditional cultures or folklore which are not so protected (which have been referred to as 'pre-existing' or 'underlying,' or 'expressions of traditional cultures/folklore *stricto sensu*').

29. For example, the Tunis Model Law on Copyright protects 'works derived from national folklore' as original copyright works, whereas folklore itself, described as 'works of national folklore,' is accorded a special (*sui generis*) type of copyright protection because they are unprotected by copyright. The Model Provisions and the Bangui Agreement of OAPI both make a similar distinction. This distinction is also reflected in national laws, for example those of Tunisia (which refers to both 'folklore' and 'works inspired by folklore')¹¹, Hungary, Indonesia and many others. The Hungarian Copyright Act of 1999 excludes expressions of folklore from protection, but stipulates that 'this may not prejudice copyright protection due to the author of a folk-art-inspired work of individual and original nature.'¹² The Copyright Law of Indonesia, 2002 provides conventional copyright protection for contemporary woodcarvings, batik art and other contemporary forms of artistic productions that typically make up Indonesia's rich cultural heritage.¹³ The Act allows for non-compulsory registration of copyright works, and the Copyright Office reports receiving many applications for registration of new batik motifs each month, mainly from Indonesian small and medium sized enterprises (SMEs). In addition, however, the Act provides *sui generis* protection for 'folklores'.¹⁴ Case law, too, demonstrates that recent adaptations and interpretations of folklore can be protected under copyright, as can contemporary designs as industrial designs.¹⁵

¹¹ Law 94-36 of February 24, 1994 on Literary and Artistic Property.

¹² Article 1, par.(7).

¹³ Article 12.

¹⁴ Article 10.

¹⁵ See WIPO/GRTKF/IC/5/3.

30. Some participants in the Committee's discussions have suggested, however, that because contemporary expressions of folklore are most often created by identifiable individuals (this is partly why they are protected by current laws), the inclusion of such expressions within the scope of the notion 'traditional cultural expressions/expressions of folklore' might over-emphasize the role of the individual in traditional creativity and so obscure the essentially collective nature of the subject matter for which protection is sought.¹⁶ In a similar vein, protected contemporary expressions of folklore are often fixed in some tangible form, and it was pointed out that this can mask the often unfixed nature of the subject matter for which protection is sought. It is argued that over-emphasis on the IP protection afforded to contemporary tradition-based creations also draws attention away from the need to protect the underlying, collectively-held subject matter in perpetuity. This perspective usefully points to the need to study more closely the precise nature of 'expressions of folklore' / 'traditional cultural expressions' for which protection is sought and, on that basis, to understand the forms of protection that may be suitable for such subject matter.

31. As traditional cultures evolve and as communities and individuals continually express themselves in new and adapted ways, what exactly are 'traditional' cultural expressions? How and by whom are they developed? 'Traditional cultural expressions' may be said to comprise a wide spectrum, ranging from truly old and pre-existing materials that were once developed communally or by 'authors unknown,' through to the most recent and contemporary expressions of them, with an infinite number of incremental and evolutionary adaptations, imitations, revitalisations, revivals and recreations in between, some of which may still identify a particular culture or community and carry religious or other meanings, while others may have no relevance to their maker other than their sale value. Are any or all of these 'expressions of folklore'/'traditional cultural expressions'?

32. These questions go to the heart of theories and conceptions of origination and creativity, and in particular, the role of the individual and the meaning of 'originality' in 'traditional' creativity.¹⁷ Questions about the role of the individual in the origination of expressions of folklore were much discussed during the elaboration of the Model Provisions. Do or can individuals create expressions of folklore? If so, are they to be regarded as 'authors' in the copyright sense? May it be said then that all TCEs had, at some point, an identifiable 'author,' and were subsequently adopted and recreated by a community? If so, are TCEs not simply productions in respect of which the time period for protection has lapsed (tending towards a position that they should not be protected again)? Or, are there characteristics of EoF/TCEs that have disqualified them from protection under current IP rules (tending towards an argument that their protection may be justifiable at least on grounds of equity)?

33. A deeper examination of these questions may help to identify more precisely the key characteristics of TCEs and what exactly should be protected and why, and provide clues as to which legal options may be desirable and possible.

¹⁶ See WIPO/GRTKF/IC/5/15. Interventions of Delegations of India at para. 31, Egypt at para. 35, Nigeria at para. 37, Saudi Arabia, para. 49, and the representatives of OAPI and ARIPO at paras. 50 and 51 respectively.

¹⁷ See Hafstein, V., 'The Politics of Origins,' forthcoming in the *Journal of American Folklore* 117 (2004) 465.

34. The nature of traditional cultures and how they evolve and develop is beyond the scope of this document. The contributions to this debate of folklorists, ethnomusicologists, anthropologists and archivists and other such scholars are necessary. However, the following section attempts to summarize a few key characteristics of EoF/TCEs of relevance to IP questions.¹⁸

Characteristics of expressions of traditional cultures/folklore

35. In common with the subject matter of most forms of IP protection, and unlike unique cultural objects, EoF/TCEs are reproducible, and susceptible to copying, adaptation and commercial exploitation. Yet, unlike many forms of conventional IP, and whether or not they are created by individuals or communities, many EoF/TCEs derive their significance and worth from community recognition and identification, and not an individual's mark of originality. In addition, although reproducible, unauthorized copies of expressions of folklore/traditional cultures will often not be regarded as 'authentic' from a community perspective, although outsiders may not know this.

36. 'Traditional' creativity is often marked by fluid social and communal creative influences.¹⁹ Many expressions of folklore are handed down from generation to generation, orally or by imitation. Lyrics, notes of songs, proverbs, designs, fables and the like often develop anonymously and circulate within the oral traditions of communities for many years (as motifs, 'floating lyrics' or 'formulas'²⁰). While not attributable to any known individual and not yet taking on an identifiable and distinctive form, they are nonetheless marked culturally and have a communal character.

37. Expressions of traditional cultures/folklore reflect and identify a community's history, cultural and social identity, and its values. They often carry religious and spiritual meanings, and perform various spiritual, social and cultural functions (linked, for example, to initiation, hunting, marriage, birth and death rites and rituals), although they may also have decorative purposes. In general, they play a key role in identifying a culture or community and in embodying and communicating religious, spiritual, social and cultural meanings, beliefs and values. This is perhaps why need for protection against misleading and false claims to 'authenticity' and origin, as well as against culturally and spiritually offensive uses of TCEs, is so often referred to by Indigenous and cultural communities.

¹⁸ See generally Brown, M., *Who Owns Native Culture*, Harvard University Press, 2003; Hafstein, *op. cit.*; Scafidi, S., 'Intellectual Property and Cultural Products,' 81 *B.U.L. Rev.* 793; Farley, Christine Haight, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" *Connecticut Law Review*, Fall, 1997; Shand P., 'Scenes from a Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion,' *Cultural Analysis*, Volume 3, 2002; Sherylle Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation," *Yearbook for Traditional Knowledge Music*, 1996, p. 57; Lindahl, Carl, 'Who Wrote 'O Death', unpublished manuscript; Feintuch, B. (Ed.), *The Conservation of Culture – Folklorists and the Public Sector*, University Press of Kentucky, 1988; *Travaux préparatoires* for Model Provisions, 1982.

¹⁹ See Hafstein, *op. cit.*

²⁰ Lindahl, *op. cit.* Also, personal communications with Michael Taft, Head of the Archive of Folk Culture, American Folklife Center.

38. What EoF/TCEs *denote* by way of their external forms is reproducible and subject to exploitation. Yet the beliefs, values and meanings they *connote* are at least as important to the affected communities. As the American Folklore Society (AFS) has noted, the commodification and privatization of the values associated with EoF/TCEs may run counter to the rights and desires of their holders.²¹ A challenge is how to balance IP protection of expressions of traditional cultures and maintenance of respect for the cultural and spiritual values they connote.

39. While the cultural heritage of a community lies at the heart of its identity and links its past with its present and future, it is also ‘living’ – it is constantly recreated as traditional artists and practitioners bring fresh perspectives and experiences to their work. Tradition can be an important source of creativity and innovation for indigenous, local and other cultural communities, as well as for local and foreign industry interests.

40. Over time, individual composers, singers and other creators and performers might, even sub-consciously, call these motifs, ‘floating lyrics’ and ‘formulas’ to mind and re-use, re-arrange and re-contextualize them in a new way.²² The resulting ‘expression’ would often be a new ‘work’ for copyright purposes.

41. There is thus a creative and dynamic interplay between collective and individual creativity, in which an infinite number of variations of traditional cultural expressions may be produced, both communally and individually.

42. In this dynamic and creative context, it is often difficult to know from a copyright perspective what constitutes independent creation, since all artists in a community dip into the commonly-held pool of lines, tunes and proverbs, and may also be influenced by each other’s use of these. A question for copyright and IP more generally is whether or not these commonly-held ‘floating lyrics’ should be the subject matter of protection.

43. It seems, however, that even where an individual may be regarded by IP law as the author of a tradition-based creation, it could still be regarded from a community perspective as the product of social, communal and even spiritual creative processes. The essential characteristics of such ‘individual’ yet traditional creations are that they still contain motifs, a style or other items that are characteristic of and identify a tradition and a community that bears it, and that they are created or performed by individuals recognized by the community as having the right, responsibility, or permission to do so. Thus, individually created but tradition-based ‘works’ and performances are not ‘owned’ by the individuals but ‘controlled’ by the community, usually according to indigenous and customary legal systems and practices.²³

44. It would appear, therefore, that the essence of ‘traditional’ cultural expressions/folklore is that, whether one is speaking of the oldest, pre-existing and collective expressions of a

²¹ Paper issued by AFS at Fourth Committee Session. See also Article 8, UNESCO Declaration on Cultural Diversity.

²² Lindahl, C., *op cit.*

²³ Intervention of the Tulalip Tribes of Washington, Committee Fifth Session (WIPO/GRTKF/IC/5/15, para. 56); Mills, *op. cit.*; Duffy, Karen, ‘Carry it on for me – Tradition and Familial Bonds in the Art of Acoma Pottery,’ thesis in partial fulfillment of Ph.D. degree, Indiana University, November 2002, p. 211.

traditional culture, or whether the most recent adaptations, performances and variations thereof, they are still regarded by a community as identifying and reflecting its traditions, values and beliefs, and thus as being ‘owned’ by that community. It seems then that expressions of folklore/cultures, whether ‘old’ or ‘contemporary’, are ‘traditional’ when they still reflect and identify the traditions, values and beliefs of a community, and are created or performed by persons communally recognized as having the right, responsibility or permission to do so. This latter quality again illuminates the need expressed by communities for the control of false and misleading claims to ‘authenticity’ and origin. It may also provide guidance on which uses of traditional cultures should be regulated and which not. As many national laws have done, it may provide the basis for distinguishing between uses of traditional materials by persons from within the culture (no consent or other regulation required) and by persons from outside the culture (consent or other regulation required).

45. IP protection currently available for individuals in respect of recent adaptations and derivations from folklore, and performances of expressions of folklore, is an important factor to take into account when determining to what extent, as matter of legal and cultural policy, additional protection is necessary for the underlying and unprotected EoF/TCEs. The protection already available, internationally, under the WIPO Performances and Phonograms Treaty, 1996 (WPPT) may in particular be a great value, because it is often through its most recent performance that folklore is visible, and it is often such a performance that is appropriated by third parties. Under the WPPT, performers of folklore already have the right to prevent, in all the countries that have ratified the WPPT, the unauthorized fixation on sound recordings of their performances and certain dealings with those fixations. Some argue that this and other forms of existing protection are adequate, and strike the right balances. Recognition of the possibility of individually held IP rights over tradition-derived works is not, however, intended to detract from the specific communal and cultural nature of EoF/TCEs *stricto sensu*.

46. The essentially communal and cultural-identification character of EoF/TCEs, even if made by individuals, is recognized in the way that EoF/TCEs are described in many national laws and in instruments such as the Tunis Model Law, the Model Provisions, the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, the Bangui Agreement of the African Intellectual Property Organization (OAPI), as revised in 1999, and the UNESCO International Convention for the Safeguarding of Intangible Cultural Heritage adopted in October 2003 (where intangible cultural heritage is defined as ‘. . . practices, representations, expressions. . . that communities, groups, and, where appropriate, individuals, recognize as part of their cultural heritage.’)

47. The Model Provisions, for example, describe ‘expressions of folklore’ as:

‘. . . productions consisting of *characteristic elements of the traditional cultural heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of such a community*, in particular:

- (i) verbal expressions, such as stories, poetry, signs, symbols and indications;
- (ii) musical expressions, such as songs and instrumental music;
- (iii) expressions by actions, such as dances, plays and rituals; and

- (iv) tangible expressions, such as paintings, carvings, sculptures, pottery, mosaic, jewelry, basket weaving, textiles, carpets, handicrafts, musical instruments and [architectural forms]’ (emphasis added).

48. The Bangui Agreement (Article 2 (xx)) defines ‘expressions of folklore’ as:

‘productions of characteristic elements of the traditional artistic heritage *developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community*, including folk tales, folk poetry, folk songs, instrumental music, folk dancing and entertainment as also the artistic expressions of rites and productions of folk art’ (emphasis added).

49. A key IP policy question concerns the recognition of claims of communities to materials developed in social, communal and even spiritual creative processes, as well as communal claims, based on indigenous and customary legal systems and practices, to contemporary ‘works’ regarded by IP laws as being ‘owned’ by individuals. Thus, claims for ‘communal rights’ may have two dimensions:

(i) Should customary rights and interests of communities be recognized in underlying expressions of folklore *stricto sensu* that may or may not have taken on a distinctive form but are marked culturally and identify a community (motifs and ‘floating lyrics,’ for example, and also more clearly formed but communal expressions)?

(ii) Should customary communal rights and interests in a work that is otherwise protected by copyright in the name of an individual author be recognized in some ways?

50. In summary, therefore, and looking also at how they are defined in many national and regional laws, it seems that EoF/TCEs *stricto sensu* in general (i) are handed down from one generation to another, either orally or by imitation, (ii) reflect a community’s cultural and social identity, (iii) consist of characteristic elements of a community’s heritage, (iv) are made by ‘authors unknown’ and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so, and (v) are constantly evolving, developing and being recreated within the community.

The nature of intellectual property protection

51. Claims for the protection of EoF/TCEs can sometimes be based upon social, cultural and economic values that differ from those on which the current IP system is founded. Intellectual property protection does not generally provide control over knowledge which has no external expression or precise delineation, no identifiable author or inventor, no novelty or originality, and where there is no temporal limitation.²⁴

‘IP protection’ and ‘preservation/safeguarding’

52. IP protection should be distinguished from the concepts of ‘preservation’ and ‘safeguarding.’ Copyright, for example, protects the products of creativity, in the form of original literary and artistic works, against certain uses such as reproduction, adaptation,

²⁴ See Van Caenegem, W., ‘The Public Domain: Scientia Nullius?’, [2002] E.I.P.R. 6, p. 324

public performance, broadcasting and other forms of communication to the public. The holder of copyright in a work has the exclusive right to prevent or authorize others from undertaking any of those acts, subject to certain exceptions and limitations. The goals of copyright protection are largely to encourage further creativity, to encourage public dissemination of works, and to enable right holders to control the commercial exploitation of works. It can also provide protection against distorting, demeaning or degrading use of a work, an issue that is often of concern for traditional cultural materials.

53. By contrast, preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of (tangible or intangible) cultural heritage in order to ensure its maintenance or viability.²⁵ Clarity on what is meant by ‘protection’ is key, because the needs and expectations of TCE holders and practitioners can in some cases be addressed more appropriately by measures for preservation and safeguarding rather than protection in the IP sense.

54. A clear appreciation of the meaning of ‘IP protection’ is also necessary to address the claims of indigenous and traditional communities. To some extent, these claims may be based upon the wish to be recognized and rewarded for having preserved and maintained traditions and cultural materials that are now available to be used as a source of creativity. If so, is this the role of IP? IP is essentially a ‘forward-looking system,’ aiming to reward innovation and creativity, and not the mere preservation of the past. If EoF/TCEs receive any form of IP protection, does this imply a shift in the objectives of IP protection? Of course not all aspects of IP protection are focussed directly on innovation and creativity, particularly the law of distinctive marks, indications and signs (laws governing trademarks, geographical indications and national symbols) as well as the related area of the repression of unfair competition. These aim at the protection of established reputation, distinctiveness and goodwill, such as may be enjoyed by a traditional community in the production of handicrafts, artworks and other traditional products.

UNESCO Convention on the Safeguarding of Intangible Cultural Heritage

55. In October 2003, Member States of UNESCO adopted an International Convention on the Safeguarding of Intangible Cultural Heritage. The new Convention addresses the important question of the preservation of oral traditions and expressions, including languages, as vehicles of cultural heritage; the performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship. The preservation of this heritage is provided for through the drawing up of national inventories of cultural property to be safeguarded and the establishment of an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage.

56. The Convention does not address IP questions. Article 3 (b) states that nothing in the Convention may be interpreted as ‘affecting the rights and obligations of any State Parties deriving from any international instrument to which they are parties relating to intellectual property rights or to the use of biological and ecological resources.’ Accordingly, it does not address the kinds of questions facing the WIPO Committee, such as to whom, if anyone, do or should expressions of intangible creativity belong as private property (including collective or communal property)? Who, if anyone, can or should enjoy the exclusive right to

²⁵ See Glossary: Intangible Cultural Heritage, Netherlands Commission for UNESCO, 2002.

commercially exploit intangible traditional creativity? Should there be legal remedies against demeaning, derogatory or offensive use of or derivations from expressions of traditional cultures? These are the kinds of complex questions, touching directly upon trade, commercial and cultural issues, that the WIPO Committee is addressing. As the representative of UNESCO stated at the Fifth Session, the distinct notions of preservation and IP protection of intangible cultural heritage are nevertheless complementary, and balance and coordination are required.²⁶ WIPO will continue to cooperate with UNESCO in this regard.

Key features of copyright protection

57. Copyright protection is available for ‘literary and artistic works’ as referred to in the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the Berne Convention). Many TCEs are ‘productions in the literary, scientific and artistic domain,’ and therefore, in principle, constitute the actual or potential subject matter of copyright protection.

58. The protection provided by copyright (the economic rights to prevent or authorize, *inter alia*, the reproduction, adaptation, distribution, communication to the public, and the moral rights of attribution and integrity) seems well suited to meeting many of the needs and objectives of Indigenous peoples and traditional communities.

59. It may be helpful at this point to set out in brief terms some of the key features of the copyright system for at least two reasons:

(i) Many EoF/TCEs are literary and artistic productions. Policy issues that the copyright system has dealt with in attempting to reach the right balances between authors and users, may also apply to ‘traditional’ literary and artistic creations. Any strategies or regimes for their protection could therefore be based upon or at least draw closely from the copyright system. This is not to suggest that the current copyright system necessarily provides an appropriate model for the protection of TCEs, but rather that it may be useful to consider some of its features and principles in considering how best to protect traditional literary and artistic productions.

(ii) Considering some of the features of copyright may also be useful in understanding the interaction between current copyright law and ‘traditional’ forms of creativity, particularly ‘contemporary’ adaptations and interpretations of traditional cultures/folklore and their relationship, under copyright, with ‘underlying’ traditional cultures/folklore. A clearer understanding of how the copyright system functions in this context can provide the basis for a sound analysis of the concerns of Indigenous and traditional communities and of possible options for addressing them.

60. This section is a brief overview and does not exhaustively cover all aspects of copyright law. It draws on previous documents²⁷ and the sources cited there, as well as other standard texts on copyright.²⁸

²⁶ WIPO/GRTKF/IC/5/15.

²⁷ See WIPO document WIPO/GRTKF/IC/5/3.

²⁸ See Gorman, R. and Ginsburg, J., Copyright, 2002; Goldstein, P., International Intellectual Property Law, 2001; Ricketson, S., The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (London, 1987).

General nature of copyright protection

61. In essence, copyright is the right of an author to control the reproduction of his or her intellectual creations. As long as the author retains physical control of the creation, the author has absolute control over it. When the creation is disclosed to others, however, it becomes possible for them to reproduce it. Copyright is a legal device that primarily enables the author to control the reproduction of his creation after it has been disclosed.

The originality requirement

62. Works must be ‘original’ in order to be protected. The term is not defined in the relevant international treaties, nor is it generally defined in national laws. It is rather a matter left for determination by the courts in relation to particular cases. Although some differences may exist between the civil law and common law legal systems on this point, it may be said that in both legal systems a work is ‘original’ if there is some degree of intellectual effort involved and it has not been copied from someone else’s work. ‘Originality’ in copyright does not mean the same as ‘novelty’ as understood in patent law.

63. At least in the common law jurisdictions, a relatively low level of creativity is required in order to meet the originality requirement. This is largely why contemporary forms of expressions of traditional culture made by current generations of society and inspired by or based upon pre-existing Indigenous or traditional designs, can be protected as new copyright works (discussed below under ‘Derivative works’).

Subject matter of protection

64. Copyright does not preclude others from using the ideas, systems, facts, concepts or information revealed in the author’s work.²⁹ It pertains only to the literary, musical, graphic or artistic form in which the author expresses ideas, information or other intellectual concepts. Copyright enables the author to control the reproduction of the form in which he has expressed himself. Anyone is free to create his own expression of the same ideas and concepts, or to make practical use of them, as long as he doesn’t copy the author’s form of expression. The dichotomy between ‘ideas’/‘information’ and ‘expression’ may sometimes be difficult to apply in practice.

65. For similar reasons, copyright protection does not extend to utilitarian aspects, formulaic or other non-original elements, colors, and techniques used to create a work, or what is sometimes referred to as a work’s ‘style.’ Copyright permits the imitation of the non-original elements or underlying ideas and concepts of works as creativity is nourished and inspired by other works. Other branches of IP law may be more useful in protecting a work’s ‘style,’ such as the law of unfair competition and the common-law tort of passing off.

Collective ownership

66. Copyright does not only protect individual creators. Copyright can protect groups of creators as joint authors or employees. However, it is necessary for the creator or creators to

²⁹ As Article 9.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) makes clear: “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”

be identifiable.³⁰ In respect of contemporary tradition-based cultural expressions, there is almost always an identifiable creator, or creators, and this requirement is generally met. Ownership of copyright can be assigned. For instance, it is possible for distinct creators to assign their rights to a collective entity, such as a community association, which can exercise the rights on behalf of a community. In addition, courts have recognized that traditional communities may have broader equitable interests in the enforcement of copyright in original works created within their cultural heritage, interests that exist in parallel with the formal ownership interests of the actual creator.³¹

67. However, where there is no identifiable creator, such as in the case of pre-existing cultural expressions communally developed or developed by ‘authors unknown,’ this is more difficult and copyright protection is unlikely. Indeed, existing copyright is unlikely to apply to truly collectively created productions, where there are no identifiable authors and where the notion of ‘authorship’ may not even be applicable. Although copyright law has been reasonably creative in overcoming the ‘identifiable author’ requirement by providing mechanisms for the protection of anonymous and pseudonymous works,³² these do not assist in the case of old, pre-existing and collective cultural expressions.

Fixation

68. According to general international principles, copyright protection is available for both oral and written works.³³ The Berne Convention explicitly leaves the choice open as to whether works should only be protected if they have been fixed in some material form. Many national laws, particularly those of common law countries, do require fixation, because this proves the existence of the work and provides a clearer and more definite basis for rights. However, many other countries do not require fixation, including countries with a civil law tradition, for example in Africa, Latin America, and Europe (including Spain, France and Germany).

Rights under copyright

69. The exclusive rights of a copyright owner normally include rights to control the reproduction (including the sound or visual recording), distribution, public performance, public recitation and broadcasting of the work. They also include an adaptation right, or the right to control the making of adaptations, arrangements or other alterations (called derivative works, for which see further below). These are generally referred to as ‘economic rights.’

70. Not all rights in copyright have exclusive effect, however. In some cases, rights may be limited so that certain use may be made of the protected work without the prior authorization of the copyright owner, provided a fair or reasonable royalty is paid. This is known as a ‘compulsory license’ or ‘right to obtain equitable remuneration.’

71. An author also enjoys certain ‘moral rights.’ These are the rights to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other

³⁰ See WIPO/GRTKF/IC/5/3.

³¹ See Janke, Terri, ‘Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions’, commissioned by WIPO.

³² See, for example, Articles 7.3 and 15.4, Berne Convention.

³³ See Articles 2.1 and 2.2, Berne Convention.

derogatory action in relation to, the work which would be prejudicial to the author's honor or reputation. Moral rights vest in the work's author, even if the economic rights have been licensed or assigned to a third party.

Derivative works

72. An author, or subsequent rightholder, normally has the exclusive right to control the making of adaptations of the work, being works based upon the pre-existing work and including any form in which a work may be recast, transformed or adapted. Examples would be translations, revisions or adaptations. These are sometimes together referred to as 'derivative works.' Although a third party needs the consent of the author to make a derivative work based upon the author's work, derivative works may themselves qualify for copyright protection if sufficiently original.

73. Even works derived from materials in the public domain can be copyright protected, because a new interpretation, arrangement, adaptation or collection of public domain materials, or even their "re-packaging" in the form of digital enhancement, colorization and the like, can result in a new distinct expression which is sufficiently 'original.' This also helps to explain why a contemporary literary and artistic production derived from or inspired by traditional culture that incorporates new elements or expression can be considered a distinct, original work and is thus protected.

74. However, the protection afforded to such derivative works vests only in the new material or aspects of the derivative work. This is referred to as 'thin copyright.' This phrase is used to refer to the thin layer of protectable elements in an otherwise unprotectable work, where the remaining elements are dictated by functionality, belong to another author or are in the public domain. The idea is that although an adaptation may be copyrightable, it cannot serve to either take something out of the public domain that was already in the public domain, or diminish an earlier author's rights.³⁴

75. Thus, aside from new material that belongs to the author, a derivative work may also comprise material that already belongs to another rightholder or material in the public domain. The copyright or public domain status, as the case may be, of this material is unaffected.

76. While a copyright holder's exclusive rights normally include a right to authorize or prevent the adaptation of the protected work, this does generally not prevent other creators from being inspired by other works or from borrowing from them. Copyright supports the idea that new artists build upon the works of others and it rewards improvisation. The challenge is, however, to distinguish unlawful copying and adaptation from legitimate inspiration.

77. Some of the legal and cultural policy issues relevant to TCEs may pivot on whether or not to grant a right of adaptation in respect of TCEs, and on the exceptions and limitations that might be appropriate, as discussed below.

³⁴ Farley Haight, *op. cit.*, note 85.

Exceptions and limitations

78. Apart from not shielding any idea or fact contained in the copyright work, copyright also allows certain “fair uses” even of the expression itself.³⁵ These may include, depending on the circumstances, reproduction of a work for purely personal and private use of the person making the copy; making quotations from a work; and use of a work for purposes of reviewing, criticizing or parodying it, just to name a few examples.

Time limited protection

79. The duration of copyright protection generally extends to 50 years after the death of the author, or 70 years in some jurisdictions. The Berne Convention and the TRIPS Agreement stipulate 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods.

80. It is generally, however, seen as integral to the copyright system that the term of protection not be indefinite; the system is based on the notion that the term of protection be limited, so that works ultimately enter the public domain. Yet, there are exceptions. Rights to the famous work ‘Peter Pan’ vest in perpetuity under United Kingdom copyright law for the benefit of a charitable cause, and a proposal has been put forward in Australia to grant perpetual protection to the art works of a renowned Indigenous artist for the benefit of his descendants.

81. Many Indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures, and in this respect the copyright system does not meet their needs. Calls for indefinite protection are closely linked to calls for retroactive protection.

Related rights

82. There are also rights ‘related to’ or ‘neighboring on’ copyright. They aim to provide protection to those who assist authors to communicate and disseminate their works to the public at large. It is generally understood that there are three kinds of related rights – rights in sound recordings (phonograms), broadcasts, and performances of literary or artistic works and, under the WPPT, 1996, expressions of folklore. These rights, and the manner in which they are exercised, can be highly significant for the protection of EoF/TCEs. For example, in an oral culture, it is often through performances of songs, chants or narration of stories that elements of traditional culture are passed within a community and between generations. Performers’ rights give the traditional performers the right to determine whether their performances should be fixed (e.g. recorded on tape), and how the fixation (e.g. recording) of the performance should be further disseminated and used.

³⁵ Harper & Row Publishers, Inc. v Nation Enterprises, 471 U.S. 539, quoted in Eldred v Ashcroft, 537 U.S. 2003.

III. A LEGAL AND CULTURAL POLICY FRAMEWORK

Introduction

83. In the work of the Committee it has been stressed that protection of EoF/TCEs should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national and international policy objectives.

84. Previous Committee documents have suggested that the policy framework for legal protection of TCEs comprises issues such as: (i) preservation and safeguarding of cultural heritage; (ii) promotion of cultural diversity; (iii) respect for cultural rights; (iv) the needs and interests of indigenous and traditional peoples and communities; and (v) promotion and protection of creativity – particularly tradition-based creativity - as an ingredient of sustainable economic development.

85. The relationship between IP and cultural policies relating to heritage, diversity and creativity is complex and requires balance and coordination. As the European Community stated in a submission on folklore to the Committee: ‘... important interests and fundamental principles of cultural exchange are at stake.’³⁶ The American Folklore Society (AFS) has noted concerns that IP regimes may impact negatively on individuals and groups who actively maintain the dynamic cultural traditions that contribute to the world’s knowledge and diversity.³⁷

86. Enhanced appreciation of this relationship requires a clear articulation of the nature and objectives of IP protection, as well as of the range of needs and expectations of holders and practitioners of EoF/TCEs as they relate to preservation and/or legal protection of EoF/TCEs. A central challenge is to address the protection of EoF/TCEs in ways that balance the concerns of users, existing third-party rights and the public interest.

Specific normative questions

87. The earlier discussion of the nature of EoF/TCEs and their relationship with IP suggests that the key normative questions are:

(i) in respect of contemporary expressions and adaptations of traditional cultures made by an individual who may or may not be a member of the relevant community and which are protected as IP:

- should the individual’s exercise of the IP rights be regulated in some way, particularly if the individual is not a member of the community whose identifying tradition he or she has ‘used’?, and
- should the relevant community enjoy any collective IP-type rights in the contemporary expression, in addition to and separate from the rights held by the individual?

³⁶ WIPO/GRTKF/IC/3/11.

³⁷ Paper issued by AFS at Fourth Committee Session.

(ii) in respect of EoF/TCEs not protected by IP systems because they are regarded as not ‘original’ or ‘new,’ and/or because there is no identifiable ‘author’ or other creator, should they be protected in an IP sense?

88. These are complex legal-cultural questions, to which only States and their communities can respond, and the extent to which internationally-agreed substantive standards for protection can be found may depend upon first reaching broad consensus on answers to them. The following paragraphs merely summarize previous discussions within the Committee on these points. Specific legal options for addressing them are dealt with in Section IV.

Contemporary tradition-based creations protected by IP

89. As many have pointed out, tradition can be an important source of creativity and innovation for indigenous, local and other cultural communities and their individual members. The use of traditional cultural materials as a source of contemporary creativity can contribute towards the economic development of traditional communities and their members (in the form of job creation, skills development, tourism promotion, foreign exchange earnings, etc.).

90. The recognition and promotion of IP protection for this contemporary creativity can in turn support such economic development. This, as several States have pointed out, is in line with the use of IP protection as a ‘forward-looking’ approach to rewarding innovation and creativity. Therefore, one objective of protection that several States and communities have identified is to harness culture and heritage for economic development (‘the cultural industries’).

91. The marketing of artisanal products also represents a way for communities to show and strengthen their cultural identity and contribute to cultural diversity. Here too IP can play a role, in certifying the origin of arts and crafts (through certification trademarks) or by combating the passing off of fake products as ‘authentic’ (through the law of unfair competition), for example, thus reinforcing the recognition and value of the traditional components of these products and their cultural-identification character.

92. Encouraging and rewarding tradition-based creativity, by recognizing copyright and other forms of IP that may vest in it, would perhaps meet the needs of those traditional communities and individuals who wish to engage in the marketplace and establish and defend property rights in their creations that are tradition-based. For them, IP rights may be helpful, whether to commercialize their tradition-based creations or to exclude free-riding competitors.

93. Cultural heritage is also a source of inspiration and creativity for parties external to the traditional or customary context, such as the entertainment, fashion, publishing, design and other cultural industries. These need not be businesses from countries other than those in which the communities are. For example, the publishing, music and audiovisual industries in many developing countries, such as India and Nigeria, draw upon local cultural materials, which amongst other things promotes cultural diversity

94. But, as copyright and industrial designs laws, for example, make no distinction based on ‘authenticity’ or the identity of the author, authors and designers who are not members of the relevant cultural community in which the tradition originated are also able to claim and enforce copyright and design rights in works and designs derived from or inspired by folklore

which is not ‘theirs.’ Under current laws, they would have no obligations to the source community, such as obligations to acknowledge the origin of their inspiration, share benefits or respect the cultural and spiritual values and meanings associated with the underlying folklore that they adapted, unless their works were presented in a way that falsely or misleadingly suggested to the public that such a connection existed.

95. In this context, some argue for the strict control of all uses of TCEs by community outsiders, including the making and exploitation of such derivative works, i.e. works based upon or inspired by their TCEs. This proposal raises the key policy question of whether the exercise of IP rights by such outsiders should be regulated in any way, beyond the repression of clearly misleading or deceptive behavior.

96. The other policy question is whether – notwithstanding an individual’s IP rights in a contemporary adaptation of an EoF/TCE – a community’s customary rights and interests in such adaptation and/or in the underlying folklore should be recognized by copyright or other law. Such communal rights and interests may relate to protection against the culturally offensive use of the adaptation (uses which may not infringe the author’s copyright but which violate the cultural and spiritual values connoted by the underlying folklore), recognition of cultural and communal harm in awards of damages and the rights to take action under copyright should the individual not be able or willing to do so.

Cultural expressions in the ‘public domain’

97. The key questions here are perhaps: should enforceable IP rights be established over TCEs that are currently deemed to be in the ‘public domain’? Or does the protection already afforded by IP to contemporary interpretations of traditional cultures adequately strike the right balances and meet the needs of traditional communities and the general public? Does it offer the greatest opportunities for creativity and economic development? Does it best serve cultural diversity and cultural preservation? Does it address the concerns of the custodians of traditional cultures?

98. Previous documents have suggested that an integral part of developing an appropriate policy framework within which to view IP protection and TCEs is a clearer understanding of the role, contours and boundaries of the so-called ‘public domain.’³⁸

99. The term ‘public domain’ is used here in the sense in which the term is used in the copyright context and it refers to elements of IP that are ineligible for private ownership and the contents of which are available for use by any member of the public.³⁹ This conventional notion of the public domain contains:

- (i) IP for which the term of protection has run out;
- (ii) IP that has been forfeited or unclaimed; and

³⁸ See WIPO document WIPO/GRTKF/IC/5/3, paras. 22 to 33.

³⁹ Litman, J., The Public Domain, quoted in Bragdon, Susan, “Rights and Responsibilities for Plant Genetic Resources: Understanding the role of the public domain and private rights in the production of public goods”, draft paper delivered at First Meeting of the Advisory Committee for IPGRI project on the public domain, Portland Oregon, November 14-15, 2002. See also Coombe, R., ‘Fear, Hope, and Longing for the Future of Authorship and a Revitalised Public Domain in Global Regimes of Intellectual Property,’ 52 *DePaul L. Rev.* 1171, 2003.

(iii) those intangible goods that fall outside the scope of protection of IP laws.⁴⁰

100. The ‘public domain’ in this context means something other than ‘publicly available’ – for example, content on the Internet may be publicly available but not in the public domain from a copyright perspective, and it is also distinct from the patent law notion of ‘prior art.’

101. The ‘public domain’ is often characterized as a construct of the IP system, which does not take into account private domains or shared intellectual commons established by customary and indigenous laws. The Delegation of Nigeria and representatives of OAPI, the Saami Council and the Tulalip Tribes of Washington, amongst others, pointed out at the Committee’s Fifth Session that the public domain was not a concept recognized by indigenous peoples and/or that as expressions of folklore *stricto sensu* had never been protected under IP they could not be said to have entered the ‘public domain.’ As some participants observed, the ‘public domain’ construct can be used to justify disentitling indigenous and traditional communities rights to their creations and innovations.

102. On the other hand, it is put forward by some that a cultural ‘commons’ (a form of public domain) serves important legal and cultural objectives. It is through sharing and contemporary adaptation and arrangement that cultural heritage is kept alive and transmitted to future generations.⁴¹ Several States have suggested that the public domain character of folklore does not hamper its development - to the contrary, it allows for new creations derived from or inspired by it at the hands of contemporary artists, and that copyright encourages members of a community to keep alive ‘pre-existing cultural heritage’ by providing individuals of the community with copyright protection when they use various expressions of ‘pre-existing cultural heritage’ in their present-day creations or works.⁴²

103. Some Committee participants have therefore argued that any protection for TCEs should strike a proper balance between protection against abuses of TCEs and the encouragement of their further development and dissemination, as well as individual creativity inspired by TCEs.⁴³ They suggest that existing IP strikes this balance, by providing authors with certain exclusive rights tempered with important limitations and exceptions.

IV. OPTIONS FOR PROTECTING TRADITIONAL CULTURAL EXPRESSIONS

Introduction

104. This section surveys the various legal options for the protection of TCEs that have already been considered or used in practice at the national level, or that have been discussed by Committee participants. Particular issues of principle and legal and policy choices which countries may wish to consider are identified in text boxes for ease of reference.

⁴⁰ See Van Caenegem, note 24 above.

⁴¹ See Uchtenhagen, Ulrich, “Protection of Adaptations and Collections of Expressions of Folklore”, National Symposium on the Legal Protection of Expressions of Folklore, Beijing, September 13 to 15, 1993.

⁴² Comments of European Community and its Member States and Canada on WIPO document WIPO/GRTKF/IC/4/3.

⁴³ For example Canada, China, Ecuador, Kyrgystan, Malaysia, Mexico, Republic of Korea, Romania, Switzerland, and the United States of America.

105. Experience with TCE protection has shown that it is unlikely that any single ‘one-size-fits-all’ solution will be found adequate to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and the needs of traditional communities in all countries. Instead, effective protection may be found in a ‘menu’ of differentiated and multiple levels and forms of protection.

106. This section, therefore surveys the range of possible options that may be considered in developing national or other approaches or systems for TCEs protection. These options include use of existing IP systems, adapted IP rights and new, stand-alone *sui generis* systems, as well as non-IP options. The options selected by various countries have depended to a large degree on the policy objectives and national goals being served. Countries which have already elected to provide specific protection for folklore have elected to do so through specific laws on folklore, within broader laws on copyright, or in conjunction with TK protection. Even so, in surveying the options taken, it may be possible to discern some general patterns that could lend themselves to the identification of common principles.

Current IP systems, adapted IP systems and stand-alone sui generis IP systems

107. Many Committee participants have asserted that current IP systems are useful, at least to some extent and in some cases, in meeting the needs of indigenous and traditional communities⁴⁴ (see diagram on page 49). They have stated that existing standards and mechanisms should be used because experience with them are a helpful guide and because they offer immediate practical benefits (including international protection under existing treaties). For example, the Group of Latin American and Caribbean States (GRULAC) has noted that use of current IP laws is one option among several:

‘Many of the protection claims, needs and expectations expressed by the holders of genetic resources and traditional knowledge (including folklore) could be entirely or partly addressed by means of the systems and provisions currently available in the intellectual property field . . . The resources offered by intellectual property have not been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them.’⁴⁵

108. Many Committee participants have also argued that current IP systems are not entirely adequate or appropriate, and that they should be modified and/or *sui generis* systems should be established. Many participants have argued for the establishment of stand-alone *sui generis* systems.⁴⁶

⁴⁴ European Community (WIPO/GRTKF/IC/1/13, paras. 20 and 165), Canada (WIPO/GRTKF/IC/1/13, paras. 46 and 166), Norway (WIPO/GRTKF/IC/1/13, para. 33), USA (WIPO/GRTKF/IC/1/13, para. 49), Poland (WIPO/GRTKF/IC/1/13, para. 156), the Asian Group (WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/2/16, para. 170).

⁴⁵ WIPO/GRTKF/IC/1/5, Annex II, page 2.

⁴⁶ Ethiopia (WIPO/GRTKF/IC/1/13, para. 50), Asian Group (WIPO/GRTKF/IC/2/16 para. 170), Thailand (WIPO/GRTKF/IC/2/16, para. 172). African Group (WIPO/GRTKF/IC/4/15, para. 62), Brazil (WIPO/GRTKF/IC/4/15, para. 63), Venezuela (WIPO/GRTKF/IC/4/15, para. 65), Colombia (WIPO/GRTKF/IC/4/15, para. 67), Russian Federation (WIPO/GRTKF/IC/4/15, para. 68), Iran (Islamic Republic of) (WIPO/GRTKF/IC/4/15, para. 69), Indonesia

109. It has also been argued that new measures and systems should first be tested at the national level,⁴⁷ and that they should be discussed, developed and implemented with the full and effective participation of affected indigenous peoples and traditional communities.⁴⁸

IP and non-IP options

110. IP-type property rights are not the only way to provide protection for TCEs. Comprehensive protection may require a range of IP and non-IP legal tools. Approaches for TCE protection, both within and beyond the IP system, could include:

- (i) Property rights:
 - (a) Use of existing IP rights and possible modifications to them;
 - (b) Stand-alone *sui generis* IP systems;
- (ii) Unfair competition;
- (iii) Trade practices and marketing laws;
- (iii) Use of contracts and licenses;
- (iv) Registers, inventories and databases;
- (v) Customary and indigenous laws and protocols;
- (vi) Cultural heritage preservation laws and programs;
- (vii) Common law and other remedies, such as rights of publicity, unjust enrichment, confidential information and blasphemy;
- (viii) Criminal law.⁴⁹

111. These are not mutually-exclusive options, and each may, working together, have a role to play. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

112. Not all of these options will be discussed in this document, in part for reasons of space and in part because practical experiences with and use of some options has not been documented.

Objectives

(WIPO/GRTKF/IC/4/15, para. 74), Morocco (WIPO/GRTKF/IC/4/15, para. 76), Egypt (WIPO/GRTKF/IC/4/15, para. 80), and Andean Community (WIPO/GRTKF/IC/4/15, para. 82) USA (WIPO/GRTKF/1/13, para. 49).

⁴⁷ See WIPO/GRTKF/IC/1/13, paragraph 87; WIPO/GRTKF/IC/2/16, paras. 75, 91, 117; Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10). See also WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/Folk/AFR/99/1) p.3; See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) pp. 80, 128, and 142; WIPO/GRTKF/IC/2/26, par. 152; WIPO/GRTKF/IC/2/16, par. 186. New Zealand (WIPO/GRTKF/IC/5/15, para. 41).

⁴⁹ For example, criminal law has been used to protect performances against bootlegging, and penal sanctions are mentioned as one means of implementing the standards set out in the Phonograms Convention.

113. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of any legal regime or approach for the protection of EoF/TCEs would be to determine relevant policy objectives.

Policy objectives expressed by States

114. States have expressed a variety of policy objectives underlying the protection of EoF/TCEs. Some of these overlap, while some may be less well served by IP systems than others. Existing *sui generis* systems which address the protection of EoF/TCEs also reveal a range of different objectives that protection of EoF/TCEs is intended to serve. These include:

- (i) Contribution to wealth creation, trading opportunities and sustainable economic development of communities and individuals;⁵⁰
- (ii) Promotion of certainty in economic relations between communities and commercial interests;⁵¹
- (iii) Promotion of the development of folklore;⁵²
- (iv) Encouragement of respect for the IP system generally;⁵³
- (v) Prevention of unauthorized exploitation, illicit use and abuse of EoF/TCEs;⁵⁴
- (vi) Contribution to the preservation of traditional cultures and folklore;⁵⁵
- (vii) Promotion of respect for traditional cultures and the communities that preserve them;⁵⁶
- (viii) Promotion of cultural diversity;⁵⁷
- (viii) Making EoF/TCEs available to the public for the benefit of all human beings, while maintaining the rights of communities and individuals;⁵⁸
- (ix) Stimulation of creativity and investment while respecting the interests of others and of society at large;⁵⁹ and
- (x) Protection of the authenticity of Eof/TCEs.⁶⁰

⁵⁰ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, page 3), Islamic Republic of Iran (WIPO/GRTKF/IC/1/13, para. 30 and WIPO/GRTKF/IC/2/16, para. 168), Madagascar (WIPO/GRTKF/IC/1/13, para. 54), Panama (WIPO/GRTKF/IC/1/13, para. 170), Romania (WIPO/GRTKF/IC/1/13, para. 176). Tunis Model Law, 1976; Model Provisions, 1982; the Pacific Regional Framework, 2002.

⁵¹ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, page 3).

⁵² Norway (WIPO/GRTKF/IC/1/13, para. 33), Egypt (WIPO/GRTKF/IC/2/16, para. 167), European Community (WIPO/GRTKF/IC/3/11.). Model Provisions, 1982.

⁵³ Egypt (WIPO/GRTKF/IC/1/13, para. 34).

⁵⁴ Egypt (WIPO/GRTKF/IC/1/13, para. 34), Romania (WIPO/GRTKF/IC/2/16, para. 176). Tunis Model Law, 1976; Model Provisions, 1982; Pacific Regional Framework, 2002.

⁵⁵ Egypt (WIPO/GRTKF/IC/2/16, para. 167), Islamic Republic of Iran, Ecuador (WIPO/GRTKF/IC/2/16, para. 166).

⁵⁶ Egypt (WIPO/GRTKF/IC/2/16, para. 167). Panama Law, 2000; Bangui Agreement, OAPI, as revised in 1999.

⁵⁷ Indonesian Copyright Act, 2002, Preamble.

⁵⁸ Egypt (WIPO/GRTKF/IC/2/16, para. 167).

⁵⁹ European Community (WIPO/GRTKF/IC/3/11).

⁶⁰ Panama Law, 2000.

IP-related objectives of communities

115. Indigenous peoples and traditional communities have expressed various objectives concerned with IP protection, such as:

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

(ii) IP protection to prevent unwanted use by others: some communities may wish to claim IP in order to be able to actively exercise IP rights that prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally offensive or demeaning use. The uses to be prevented could include use that falsely suggests a connection with a community; derogatory, libelous, defamatory or fallacious use; and use of sacred and secret TCEs;

(iii) Prevention of others acquiring IP rights over TCEs: communities are also concerned to prevent others from gaining or maintaining IP over derivations and adaptations of TCEs and representations. This entails the use of defensive mechanisms to block or pre-empt third parties' IP rights that are considered prejudicial to the community's interests, and to the integrity of their cultural heritage and cultural expressions.

<i>Setting policy objectives</i>
National strategies and systems should be based on an assessment of the policy objectives and needs that should be served by the protection of expressions of folklore/traditional cultures, taking into account the needs and concerns of indigenous and traditional communities, as well as relevant legal and cultural policy issues.

The options for protection*Lessons of actual examples of appropriation and misappropriation*

116. Previous Committee documents set out examples of the kinds of appropriations of cultural expressions that Indigenous and local communities and other custodians and holders draw attention to. These actual examples suggest that such communities and other stakeholders would require protection against:

(i) unauthorized adaptation, reproduction and subsequent commercialization of TCEs, with no sharing of economic benefits;

(ii) use of TCEs in ways that are insulting, degrading and/or culturally and spiritually offensive;

(iii) appropriation of the reputation or distinctive character of TCEs in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and “style;” and

- (iv) failure to acknowledge the source of a tradition-based creation or innovation.

117. These concerns demonstrate that the protection of TCEs may refer to protection of (i) the expressions themselves; and/or (ii) the reputation or distinctive character associated with them; or (iii) their method of manufacture (in the case of handicrafts and textiles, for example). All branches and forms of IP are therefore relevant, whether copyright, related rights, trademarks, industrial designs, patents or unfair competition, for the protection of TCEs.

118. In order to make this analysis of options as practical as possible, and using the above as a basis, this section discusses options in relation to a few examples of misappropriation in order to demonstrate how the range of options can have been applied or considered so far in practice and how the options can interact with each other:

- (i) Protection of traditional literary and artistic productions against reproduction and adaptation and other such acts, as well as the prevention of insulting, derogatory and/or culturally and spiritually offensive uses;
- (ii) Protection of handicrafts, particularly against imitation of their style;
- (iii) Prevention of false and misleading claims to authenticity and origin/failure to acknowledge source;
- (iv) The defensive protection of traditional signs and symbols.

Key issues for developing approaches or systems

119. Previous documents have suggested that in developing any general approach or legal regime for the protection of TCEs in general, the following key issues must be addressed:⁶¹

- (i) Objectives of protection (already discussed above);
- (ii) Subject matter (scope of protection);
- (iii) Criteria the subject matter must meet as a condition for its protection;
- (iv) Holders of the rights and the management of rights;
- (v) Rights conferred, and exceptions and limitations;
- (vi) Procedures and formalities, if any, for the acquisition and maintenance of the rights conferred;
- (vii) Sanctions and enforcement procedures;
- (viii) How rights are lost and expire; and
- (ix) Transitional arrangements.

120. The same structure was used for the presentations on TCE protection made during the Committee's fourth session,⁶² and for the comparative analysis of *sui generis* systems in document WIPO/GRTKF/IC/5/INF/3.

Options for protecting traditional literary and artistic productions

Copyright-based options

⁶¹ See WIPO/GRTKF/IC/5/3.

⁶² Documents WIPO/GRTKF/IC/4/INF/2 to 5 Add.

Criteria for protection

121. *Originality requirement.* Contemporary, tradition-based literary and artistic productions are often sufficiently original to be protected under regular copyright law.⁶³ Such contemporary productions may include new interpretations, arrangements, adaptations or collections of pre-existing cultural expressions, or even their ‘re-packaging’ in the form of digital enhancement, colorization and the like.

122. A key policy question is whether protection should be extended to expressions of folklore *stricto sensu*, and mere recreations and imitations of this material, which is presently regarded as being in the public domain from the point of view of the IP system. In clarifying options for the criteria for protection, this issue turns on whether or not a form of ‘originality’ is required, and if so, how originality would be interpreted in the traditional or folklore context.

123. Generally, existing *sui generis* systems are not conceived as a subset of copyright, and they do not require originality. For example, the Model Provisions make no reference to an originality requirement; consequently, nor do many of the national copyright laws which have implemented them. Similarly, there is no explicit originality requirement in the Panama Law and in the Pacific Regional Framework.

124. *Fixation:* It is often suggested that oral traditional literary and artistic productions are not and cannot be protected because they are not fixed. Many TCEs are preserved and passed between generations by oral means and are traditionally never written down. Fixation is not a necessary element of copyright law, and countries can provide that works in general or TCEs in particular do not need to be fixed in some material form in order to be protected.

125. For example, the Tunis Model Law rules out any possibility of demanding fixation for a work of folklore. The drafters felt that works of folklore are often by their very nature in oral form and never recorded, and to demand that they be fixed in order to enjoy protection puts any such protection in jeopardy and even, according to the commentary to the Model Law, risks giving the copyright to those who fix them. Fixation is not a requirement of the Model Provisions, the Law of Panama, the Bangui Agreement and the Pacific Regional Framework.

126. *Capable of commercial use:* One existing *sui generis* system has provided that protected TCEs must, amongst other things, be ‘capable of commercial use.’⁶⁴

127. *Traditional:* Several *sui generis* systems provide that the protected subject matter must be based upon ‘tradition’⁶⁵ or be ‘traditional’⁶⁶ (meaning in that case that the TCE must have been created for traditional purposes, be inter-generational, pertain to a particular group and be collectively held).

Holders of rights/management of rights

⁶³ See WIPO/GRTKF/IC/5/3.

⁶⁴ The Law of Panama.

⁶⁵ The Law of Panama.

⁶⁶ Pacific Regional Framework.

128. *Communal rights*: Several Committee participants have emphasized that EoF/TCEs are generally regarded as collectively originated and held, so that any rights in this material should vest in communities rather than individuals.⁶⁷ Such communal rights may have two dimensions:

(i) customary communal rights and interests in underlying expressions of folklore *stricto sensu* could be recognized and protected in an IP sense, and/or;

(ii) customary communal rights and interests in a work that is also protected by copyright in the name of an individual author could be recognized and protected.

129. Courts have been prepared to recognize communal interests in a copyright work.⁶⁸ Communal copyright could also be the subject of a specific *sui generis* provision within copyright legislation. Australia is, for example, studying the possibility of granting communities the right to exercise moral rights to protect against inappropriate, derogatory or culturally insensitive use of tradition-based copyright material.⁶⁹ Recently, the Australian Attorney General stated his Government's intention that the necessary amendments to the Copyright Act be introduced into Parliament by the end of 2003.⁷⁰

130. Collective rights have also been provided in stand-alone *sui generis* legislation:

(i) the Philippines Law provides rights for 'indigenous cultural communities/indigenous peoples;'

(ii) the Panama Law provides for the protection of the 'collective rights of the indigenous communities,' and applications for registration of these rights shall be made by 'the respective general congresses or indigenous traditional authorities;'

(iii) the Pacific Regional Framework vests 'traditional cultural rights' in 'traditional owners,' defined as the group, clan or community of people, or an individual who is recognized by a group, clan or community of people as the individual in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community. These rights are in addition to and do not affect any IP that may subsist in the expressions of culture.

131. However, most national laws which currently provide *sui generis* protection for TCEs, and which were based on the Model Provisions and the Tunis Model Law vest rights in the State or a statutory body, or at least provide that the rights shall be managed and exercised by the State. They require that authorizations for using expressions of folklore should be obtained either from an entity (a 'competent authority') established by the State (this option creates a legal fiction that the State is the 'author' and/or the 'owner' of the rights in the expressions) or from the 'community concerned' (Section 10). The Tunis Model Law requires that rights in folklore shall be exercised by a Government appointed authority

⁶⁷ GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5), SAARC (WIPO/GRTKF/IC/1/13, para. 26), Indonesia (WIPO/GRTKF/IC/1/13, para. 29).

⁶⁸ See Janke, Terri, 'Minding Culture – The Protection of Traditional Cultural Expressions', commissioned by WIPO.

⁶⁹ Intervention of Delegation of Australia (WIPO/GRTKF/IC/5/15, para. 131).

⁷⁰ 11th Biennial Copyright Law and Practice Symposium 2003, Sydney, November 20 and 21, 2003.

(section 6). In most of these cases, proceeds from the granting of such rights are applied towards national heritage, social welfare and culture-related programs.

132. *Individual rights*: States have also noted that individuals develop and create EoF/TCEs and that rights they have under copyright and other IP rights should be recognized. It is argued by some that recognizing such rights is essential to encouraging and promoting tradition-based creativity. This is precisely how, some argue, the IP system is intended to work - not to reward the preservation of the past, but rather to revitalize it and incentivize tradition-based creativity for economic growth.⁷¹ It is pointed out that any copyright in the derivative work attaches only to new materials and leaves underlying materials unaffected. This was referred to earlier in this document as the ‘thin copyright’ principle.

133. The question arises, however, whether and how there should be regulation of derivative works created by individuals, particularly those not connected with the traditions and cultural materials they adapted or were inspired by.

134. The Model Provisions, the Tunis Model Law, the Bangui Agreement, and other *sui generis* systems and national laws generally lack such restrictions. The Model Provisions, contain no right of adaptation and have a wide ‘borrowing exception’ (see ‘*Rights, exceptions and limitations*’ below). However, it is often the adaptation and commercialization of traditional materials by outsiders that can cause the most cultural offense and economic harm. It might even be suggested by some that copyright and other IP rights in such tradition-based creations made by outsiders should not be recognized.

135. A possible approach, found in the Pacific Regional Framework, is not to deny copyright or other IP rights to derivative works made by non-traditional creators, but to place upon these external creators certain obligations towards the relevant community (such as to acknowledge the community, to share benefits from exploitation of the copyright, or to respect some form of moral rights in the underlying traditions used). This approach fills the gap in the Model Provisions in respect of adaptation of folklore and the creation of derivative works.

136. *Management of rights*: There are various options possible in cases where the preference is for vesting rights other than in a community. Reference has already been made to current national practices in many States where a statutory body is designated as the holder of the rights in TCEs, which are to be exercised in the interests of a particular community or the State’s communities in general.⁷² In many cases, it is the copyright office that performs this function, but it need not be.

137. Irrespective of whether communities or State appointed bodies are vested with rights, existing collective management organizations (CMOs) are potentially the most practical means of administering rights in EoF/TCEs. Committee participants⁷³ and CMOs themselves⁷⁴ have expressed interest in exploring this possibility further.

⁷¹ European Community (WIPO/GRTKF/IC/3/11.), Egypt (WIPO/GRTKF/IC/1/13, para. 34). African Group submission WIPO/GRTKF/IC/3/15).

⁷² See responses to folklore questionnaire and WIPO/GRTKF/IC/3/10, and GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5).

⁷³ GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5).

⁷⁴ Such as the International Federation of Reprographic Rights Organizations (IFRRO).

138. The Tunis Model Law, the Model Provisions, the Philippines Law and the Pacific Regional Framework, all envisage an authority which administers the rights, grants authorizations and performs other tasks – for instance, the ‘cultural authority’ provided for in the Pacific Regional Framework and the National Commission on Indigenous Peoples (NCIP) in the Philippines Law have many other functions.

139. *Folklore shared by several communities/‘regional folklore:’* In some cases, two or more communities in one country may hold potentially overlapping rights in the same or very similar TCEs. How would competing claims to rights in the same or similar TCEs be dealt with? The options include co-ownership of rights and allowing communities separately to apply for (if some form of application is necessary) and hold rights in the same or similar TCEs.

(i) In the Panama Law, for example, it states that more than one community can apply for and be registered as the holders of rights in the same TCE. A further possible solution to this issue is to vest the rights in the State or statutory body, as mentioned above.

(ii) Under the Pacific Regional Framework, the ‘cultural authority’ is tasked with resolving disputes as to ownership of a particular TCE. The dispute must be resolved according to customary law or other means. If no ‘traditional owners’ can be found or there is no agreement as to ownership, the cultural authority can be determined to be the traditional owner.⁷⁵

140. In addition, communities in different countries and even regions may lay claim to the same or similar folklore (referred to previously as ‘regional folklore’). This latter aspect is covered more extensively in document WIPO/GRTKF/IC/6/6 on the ‘international dimension.’ In responses to the 2001 folklore questionnaire, States suggested *inter alia* the use in such cases of national and/or international folklore databases, ADR, systems of registration and notification, collective management and the establishment of dispute-resolution organizations.⁷⁶

141. Existing regional organizations and mechanisms (such as ARIPO and OAPI in Africa, who, together with Zambia, have raised in the Committee⁷⁷) may be important stakeholders in resolving the ‘regional folklore’ question. Their potential role needs further exploration.

Rights, exceptions and limitations

142. *Nature of the rights:* It has frequently been argued that systems and mechanisms for the protection of TCEs should as far as possible seek to recognize and operationalize a principle of ‘prior informed consent’ for TCE holders. Such consent could have two basic contexts:

(i) ensuring prior informed consent prior to the recording or fixation of expressions of folklore (such as a sound recording, a photograph or a written transcription of an oral narrative) – for example, this could be implemented in part through a right to give consent to

⁷⁵ Articles 18 and 19.

⁷⁶ See for example the responses of Canada, Colombia, Egypt, Gambia, Indonesia, Jamaica, Kyrgyzstan, Malaysia, Mexico, Romania and the Russian Federation.

⁷⁷ WIPO/GRTKF/IC/5/15, paras. 48, 50 and 51.

the fixation of a performance of an expression of folklore (as is already provided under the WPPT); and

(ii) ensuring that TCE holders can exercise rights over certain uses of EoF/TCEs by third parties, thus enabling them to set the terms for commercial exploitation and to veto some usages (including offensive or derogatory usage).

143. In copyright and IP law, the chief mechanism for implementing prior informed consent would be to recognize exclusive rights in the protected subject matter. Exclusive rights (the rights to authorize or prevent the carrying out of certain acts) are provided for in the Tunis Model Law, the Model Provisions, the Panama Law, the Pacific Regional Framework, and the Philippines Law.

144. Exclusive rights are seen by some as the way to enable communities to prevent unauthorized uses of their EoF/TCEs and/or to control their commercial use by others in ways that ensure appropriate acknowledgement of source, benefit-sharing and respect for customary cultural and spiritual values.⁷⁸

145. However, not all the rights granted in copyright and related rights are necessarily exclusive. Some performers' rights systems have established a simple right to give (or deny) consent to the fixation of a performance, rather than a separate exclusive right in the performance as such, that can be separately exercised after fixation. Other forms of copyright protection do not hinge on prior consent, but entitle the right holder to an equitable remuneration for use of the protected material. Such arrangements are well-known in the copyright area, and are also referred to as non-voluntary or compulsory licenses (see, for example, Articles 11*bis* (2) and 13(1) of the Berne Convention).

146. These approaches have been found to strike the right balance for some rights within the copyright system, and some systems for the protection of expressions of folklore have also used a right to equitable remuneration approach, often through a *domaine public payant* system.⁷⁹ In this system, there is a general entitlement to use the productions which are considered in the 'public domain,' only subject to payment of a fair royalty. It is used in the Bangui Agreement and in the national laws that have followed it. Some have criticized this system on the grounds that it impairs the important role the public domain plays in the copyright system.

147. *Which rights?* Following the example set by most copyright-inspired national laws, rights over traditional literary and artistic materials could extend to acts such as reproduction, public performance, distribution, public recitation, communication to the public and importation (of unauthorized copies and adaptations under the law of the importing country). These rights could be assigned and licensed (although laws could restrict such assignment to ensure that rights remain with the traditional communities). Moral rights (including the possibility of communal moral rights) may also be particularly important, and typically could not be assigned or transferred.

⁷⁸ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2 and Annex II, p. 5), Zambia (WIPO/GRTKF/IC/1/13, para. 38)

⁷⁹ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2 and Annex II, p. 5), Bangui Agreement of OAPI, see WIPO/GRTKF/IC/5/INF 3.

148. Some key policy and legal questions covered in this document pivot on the adaptation right in copyright law, and on the setting of appropriate exceptions and limitations. An adaptation right applies to the making of derivative works based on EoF/TCEs: these works may separately qualify for copyright protection as original works. An adaptation right would allow the community or other rightsholder to prevent or authorize such a derivative work, or alternatively to receive an equitable remuneration for its use, when the work is derived from their EoF/TCE. If there is no such adaptation right, the community cannot control this use of its cultural materials and traditions.

149. The Model Provisions do not provide rightsholders in EoF with an adaptation right, and as if to emphasize the point, also provide a wide exception in respect of ‘the borrowing of expressions of folklore for creating an original work of an author or authors.’⁸⁰ This exception was specifically crafted to allow free development of individual creativity inspired by cultural expressions. The Model Provisions were not intended to hinder in any way the creation and subsequent IP protection of original works based on cultural expressions.

150. National laws which have established *sui generis* systems for the protection of TCEs or folklore differ on this point. Some grant an adaptation right and others do not. The Pacific Regional Framework has an adaptation right, but places upon external creators certain obligations towards the relevant community (such as to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying traditions used).

151. Failure to acknowledge source or misleading indications as to source are a frequent charge of indigenous and traditional communities. Although this aspect is treated in more detail below, the Model Provisions and many copyright-based systems for folklore protection provide rights and remedies in respect of a failure to acknowledge source.

152. *Which exceptions and limitations?* Just as copyright protection is subject to certain limitations and exceptions, the copyright inspired national laws which protect EoF/TCEs contain most of the exceptions and limitations typically found in copyright laws. The Model Provisions provide that no authorization is required for use of expressions of folklore for purposes of education, utilization “by way of illustration” in an original work, where expressions of folklore are ‘borrowed’ for creating an original work of author, and ‘incidental utilization’ such as reporting on current events and uses of expressions of folklore located permanently in a public place.

153. More generally, many States have stressed that any IP-type protection of TCEs should be subject to numerous limitations so as not to protect them too rigidly. Overly strict protection may stifle creativity and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement.

154. Not all typical copyright exceptions may be appropriate as they might undermine customary rights under customary laws and protocols – for example, exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission.⁸¹ Similarly,

⁸⁰ Section 4 (1) (iii), Model Provisions, 1982.

⁸¹ McDonald, I., *Protecting Indigenous Intellectual Property* (Australian Copyright Council, Sydney, 1997, 1998), p. 44.

national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. However, doing so in respect of copyrighted cultural expressions may raise cultural and spiritual issues.

155. Existing *sui generis* systems, whether part of copyright laws or stand-alone, have created exemptions for:

- (i) uses of TCEs by ‘traditional owners’ (the Pacific Regional Framework);
- (ii) uses made without gainful intent and within the traditional or customary context (the Model Provisions);
- (iii) folkloric dance groups and small non-indigenous artisans (the Panama Law);
- (iv) uses by public entities for non-commercial purposes (the Tunis Model Law);
- (v) uses by citizens of the country (as opposed to non-citizens).

Procedures and formalities

156. Committee participants have suggested that the forms of protection should be practically feasible, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike. ADR should be utilized where possible.⁸²

157. *Automatic protection/registration.* A key choice is whether or not to provide for automatic protection or for some of registration.

(i) One option would be to require automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similarly with copyright.

(ii) A second option is to require some form of registration, possibly subject to formal or substantive examination. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights. Some form of registration may provide useful precision and certainty on which TCEs are protected and for whose benefit. For intangible cultural expressions, fixation in some form, such as through recording or documentation, provides a mode of protection in itself.

158. It may be noted that earlier drafts of the Model Provisions established a registration system, but this aspect was later deleted because it was felt registration and documentation were more aligned to preservation than IP protection. The Model Provisions and the Pacific Regional Framework do not provide for any form of registration or documentation.

159. Several *sui generis* laws for TCE protection use a registration system, including those of Panama and the Philippines. Other countries, such as Cuba,⁸³ provide for registries. Costa Rica’s response to the WIPO folklore questionnaire of 2001 set out detailed proposals for establishing and managing such registers.

⁸² GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p.9), Asian Group (WIPO/GRTKF/IC/2/10, African Group (WIPO/GRTKF/IC/3/15).

⁸³ See WIPO/GRTKF/IC/3/10 and Dolores Isabel Aguero Boza, “Artisanal Works and Copyright”, paper presented at WIPO/ITC Workshop on Legal Protection of Original Craft Items, Havana, January 30 to February 1, 2001, WIPO-ITC/DA/HAV/01/6.

Sanctions and enforcement procedures

160. Communities and others argue that the remedies available under current law may not be appropriate to deter infringing use of the works of an Indigenous artist-copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. Damages awarded by courts could take such cultural issues into account, as in the case *George M*, Payunka, Marika and Others v Indofurn Pty. Ltd.*⁸⁴

How rights are lost or expire

161. The duration of copyright protection generally extends to 50 years after the death of the author, or 70 years in some jurisdictions. The Berne Convention and the TRIPS Agreement stipulate 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods. Different terms may apply for certain related rights.

162. It is generally seen as integral to the balance within the copyright system that the term of protection not be indefinite, so that works ultimately enter the public domain. Yet, there are exceptions. Rights to the famous work 'Peter Pan' vest in perpetuity under United Kingdom copyright law for the benefit of a charitable cause, and a proposal has been made in Australia to grant perpetual protection to the art works of a renowned indigenous artist for the benefit of his descendants.

163. Many Indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures, and in this respect the copyright system does not meet their needs. Calls for indefinite protection are closely linked to calls for retroactive protection.

164. No time limit is set in the Model Provisions, the Panama Law and the Pacific Regional Framework. It has been suggested that the claim for indefinite protection might be limited to a 'forward-looking' term of protection, rather than retrospective, and that TCEs could be protected for the next 150 years, for example.⁸⁵ It has also been suggested that the maximum term of protection could be linked to the lifespan of the source community. This would entail a trademark-like emphasis on current use, so that once the community that the TCE identifies no longer uses the TCE or no longer exists as a defined entity, protection for the TCE would lapse.⁸⁶

⁸⁴ 30 IPR 209. See Janke, 'Minding Culture' studies (WIPO/GRTKF/IC/5/Study 2).

⁸⁵ See WIPO/GRTKF/IC/5/15, par. 37.

⁸⁶ Scafidi, S., 'Intellectual Property and Cultural Products,' 81 *B.U.L. Rev.* 793.

Recordings and performances of literary and artistic productions*The use of contracts and the role of folklorists*

165. Copyright and/or related rights vest in audio and audiovisual recordings, and when the recordings capture a folkloric performance or other materials (such as music or fables), the rights in the recordings can be used to protect, indirectly, interests in the folkloric materials.

166. Indigenous peoples and local communities sometimes argue that their IP-related rights and interests, including those under customary and indigenous laws, are not always safeguarded when their EoF/TCEs are first recorded and documented by folklorists and other fieldworkers or when they are subsequently displayed and made available to the public by museums, archives and other collections.

167. The activities of folklorists, collectors, fieldworkers, museums, archives etc., are extremely important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Museums also play a valuable educational role. And of direct relevance to IP, it is sometimes due only to the efforts of folklorists and collections that it is possible to trace the true origins of tradition-based musical and other creations and attempt to ensure that the creators or their heirs are suitably acknowledged and where possible rewarded. Previous documents have provided information on the activities and experiences of folklorists, museums, archives and cultural heritage institutions.⁸⁷

168. However, in relation to IP issues, field recordings held by archives, museums and other such institutions assume a central importance because they may be the only recordings of a song and its performance that is available and accessible by commercial and other users. The strategic management of the IP rights in those recordings can advance the rights and interests of the original providers and custodians of TCEs. Such institutions can play a key mediatory role in protecting TCEs while also making it possible for people to use, re-use and re-create cultural heritage which is vital to its survival. These IP rights could be used in ways too that recognize Indigenous and customary laws and protocols, a long-standing demand of Indigenous peoples and local communities. These issues are more fully discussed in previous documents.⁸⁸

169. This matter also demonstrates in a practical way tensions that can arise between preservation and protection, as discussed earlier, because the very process of preservation can trigger concerns about lack of protection and can run the risk of unintentionally placing TCEs in the 'public domain' from the perspective of the IP system.

170. The relationship between preservation in the form of recordings and databases and protection is also a positive one. Recording and fixing TCEs in a material form (such as in an audiovisual recording) may be the only effective way of establishing IP in intangible, oral forms of TCEs which would otherwise be unprotected by current IP rights.

⁸⁷ See WIPO/GRTKF/IC/5/3, paras. 223 to 276.

⁸⁸ See WIPO/GRTKF/IC/5/3.

Possible practical tools

171. Past Committee discussion has covered several practical tools to address these and similar IP issues in relation to recordings and collections of TCEs. Briefly, these include developing:

- (i) IP-related *protocols, codes of conduct and guidelines* for use by folklorists, museums and archives;
- (ii) IP *check lists and model IP contractual clauses* for use in elaborating deposit, access, release and license agreements used by folklorists, museums and archives;
- (iii) for digitized cultural heritage, model IP-related “*Rules of Use*” and “*Copyright Notices*” for use in connection with websites, CD-ROMs, specialized databases and other electronic multimedia products.

172. Two additional avenues worth exploring further are the use of software and digital rights management tools, and taking advantage of the IP protection of collections and databases.

173. Member States of WIPO have expressed support for WIPO exploring these options and issues further, working closely with relevant institutions, associations and centers, inter-governmental organizations, non-governmental organizations and other experts.

174. These issues are already addressed in many instances, and activities such as those above could draw extensively upon rich experience in this area. Anthropologists, folklorists, ethnomusicologists and others have discussed this issue at length.⁸⁹ Several policies, ethical codes, protocols and guidelines have already been developed by folklorist, ethnographic and anthropological societies and other professional bodies. Recent annual meetings of the American Folklore Society (AFS) and the International Association of Sound and Audiovisual Archives (IASA) addressed these topics.

Performances of traditional literary and artistic productions

175. Performers’ rights, as recognized in the WIPO Performances and Phonograms Treaty, 1996, (WPPT), protect performances of ‘literary and artistic works or expressions of folklore.’ Therefore, in terms of public international law, the kind of performances for which protection is sought are protected, either because they are literary and artistic works or EoF.

176. Protection of performers’ rights provides protection, indirectly, for the work or production being performed. For example, the fixation of a performance may be the point at which the underlying folklore is captured in a form that lends itself to exploitation, but

⁸⁹ Seeger, A., *op. cit.*, Chaudhuri, S., “The Experience of Asia,” paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand April 8 to 10, 2002; Peters, M., “Protection of the collection of expressions of folklore; the role of libraries and archives,” paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand April 8 to 10, 2002; Seeger, A., “Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property,” 1996 Yearbook for Traditional Music, p. 87; Toelken, Barre “The Yellowman Tapes, 1996-1997,” Journal of American Folklore 111 (442) 381-391, 1998.

performers' rights provide for control over both the fixation of the performance, and moral and economic rights over its subsequent exploitation. There are numerous cases in which performers' rights have been used to protect communal interests in the cultural expressions being performed, such as the case involving Enigma's hit 'Return to Innocence.'⁹⁰

177. It follows that performers of expressions of folklore in WPPT Contracting States can expect to receive both moral and economic rights in the other Contracting States in accordance with Articles 5 to 10 of the WPPT – an international system of protection for performances of expressions of folklore is therefore already in place.

178. One limitation is that protection under the WPPT does not extend to the visual part of performances. Only the aural parts are protected, that is, parts that may be perceived by the human ear. Work continues at WIPO on the development of an instrument for the protection of audiovisual performances.

Documentation of literary and artistic productions

179. Some Committee participants have called for the documentation of EoF and the establishment of inventories, databases and lists. Such calls are apparently made mainly within the context of programs for the preservation of folklore and cultural heritage. The documentation issue also relates in some ways to the fixation requirement in copyright law (discussed above) and the question of whether registration should be required for protection (discussed above).

180. Cultural heritage programs at the international, regional and national levels frequently establish registers, lists and inventories of intangible and tangible cultural heritage as useful tools for identification, promotion and safeguarding. For example, Brazil has established a Registry of Intangible Heritage and the newly adopted International Convention on the Safeguarding of the Intangible Cultural Heritage of UNESCO envisages the establishment of national and international inventories and lists.

181. However, it is not clear to what extent documentation and the establishment of registries, lists and inventories, could play a role in relation to the IP protection of the TCEs. TCEs or EoF are often intangible and orally maintained. This is one of the reasons why the fixation requirement for copyright protection is criticized, and why most *sui generis* systems do not require fixation. EoF/TCEs are also 'living,' constantly being adapted and recreated. Requiring some form of prior documentation and/or registration may contradict the oral, intangible and 'living' nature of many TCEs.

182. The copyright system, whose principles and forms of protection are most closely relevant to EoF/TCEs, does not permit the imposition of any formalities and protection is automatic upon the creation of a work. There is no prior examination, unlike most forms of industrial property. There is an immediate practical reason for documenting technical TK as a defensive measure, in order to defeat claims of novelty and inventive step for patent examination purposes, but this is not applicable to cultural copyright materials.

⁹⁰ See WIPO/GRTKF/IC/5/3 and Coombe, *op. cit.*

183. Earlier drafts of the Model Provisions provided for a registration system for folklore, but this was deleted because it was felt that registration and documentation was more relevant to preservation than IP protection. The Tunis Model Law rules out any possibility of demanding fixation for a work of folklore. The drafters felt that works of folklore are often by their very nature in oral form and never recorded, and to demand that they be fixed in order to enjoy protection puts any such protection in jeopardy and even, according to the commentary to the Model Law, risks giving the copyright to those who fix them. Fixation is not a requirement of the Model Provisions, the Panama Law (although it has a registration requirement, a distinct issue), the Bangui Agreement nor the Pacific Regional Framework.

184. Apart from the costs involved in documenting and recording TCEs, the copyright that may vest in the documentation and recordings may (i) not vest in the communities themselves (unless they are the authors or have taken assignment of the rights) and (ii) in any event extends only to the ways in which the TCEs are expressed and not to the values, meanings and other ‘ideas’ connoted by the TCEs. Documentation and recordal, on the other hand and particularly if it is made available in digitized form, makes the TCEs more accessible and available and may undermine the efforts of communities to protect them.

185. Therefore, the documentation of traditional literary and artistic productions has not necessarily been referred to as a useful option for IP strategic purposes in previous Committee documents dealing with EoF/TCEs.

186. Documentation does of course play an important role in strategies for the safeguarding of cultural heritage and traditional cultures, and it could be explored further how existing cultural heritage inventories and lists could be used for IP purposes, such as to identify traditional owners and applicable customary laws.

187. There are in addition some other areas worth pursuing that may enhance the value of documentation/recordal of TCEs as a strategy for positive protection, namely the use of software and digital rights management tools and the evolving the protection available for collections and databases.⁹¹

Protection against insulting, derogatory and offensive uses

188. Given the cultural and spiritual nature of EoF/TCEs, particular emphasis could be placed on preventing the insulting, derogatory and culturally and spiritually offensive uses of them, particularly sacred TCEs. In fact, such ‘defensive protection’ might be the most important and only form of protection that some States could consider.

189. Apart from laws against blasphemy and other such non-IP tools, some IP-based options have been discussed. For example, a communal moral right, as proposed in Australia (see paragraph 129 above) would enable communities to act against certain uses of indigenous cultural materials, much in the same way that moral rights enables an author to object to the distortion, mutilation or other derogatory use of his or her works.

190. A further possibility, discussed previously, is the creation of a register, or even perhaps an international register, for the registration, by communities, of those TCEs whose uses

⁹¹ See WIPO/GRTKF/IC/5/3, paras. 241-262.

should not be permitted for cultural and spiritual reasons, such as sacred expressions. Registration would have the advantages of focussing protection on discrete TCEs and those that communities deem worthy of protection and therefore proactively register. Prior registration affords some precision and certainty that is absent from more general protection systems.

Issues and options: traditional literary and artistic productions

The key policy choice lies between whether:

- (a) the protection of contemporary adaptations, derivations and performances of EoF/TCEs through existing IP laws is sufficient, or
- (b) for the purposes of national legal systems, some form of IP-type protection of EoF/TCEs *stricto sensu* is warranted. See also the diagram on page 49.

IP protection of EoF/TCEs *stricto sensu* has been incorporated within several conventional IP laws and the WPPT.

The following options and issues (based upon actual experience to date) may guide the development of enhanced protection of traditional literary and artistic productions:

Criteria for protection: issues include whether or not to require ‘originality’ and ‘fixation’ as criteria for protection, and whether eligible EoF/TCEs should be ‘capable of commercial use,’ ‘traditional’ and/or ‘based on tradition.’

Communal/collective rights: options could include statutory recognition of ‘collective rights,’ introduction of communal moral rights and the vesting of rights in a new or existing State-appointed authority or office, such as the copyright office. A related option is the use of copyright collective management systems.

Copyright of individuals: the issue is how best to integrate and balance protection of communal rights in EoF/TCEs with the copyright and other IP rights of individual creators of derivative works. For example, an option could be to regulate the exercise of such IP rights in favor of the community and its values.

Nature of rights: a choice could be made as to whether exclusive rights or rights to equitable remuneration would be the more appropriate.

Rights granted: these could include typical economic and moral rights granted by copyright law. A particular choice may be needed as to whether or not to grant an adaptation right. A further option is to provide rights and remedies for the failure of a user of an expression of folklore/traditional culture to acknowledge source.

Exceptions and limitations: options could include the typical exceptions and limitations found in most copyright laws. States may wish, however, to limit some of those exceptions where they may allow uses of TCEs that are contrary to cultural and spiritual values. Options also include specific *sui generis* exceptions, such as exemptions for: traditional or customary uses of TCEs and/or uses without gainful intent; uses by folkloric dance groups and small scale non-indigenous artisans; uses by nationals as opposed to non-nationals; and, uses by public entities for non-commercial purposes.

Procedures and formalities: a key choice for States is whether or not to provide for automatic protection or for some form of registration.

Sanctions and remedies: communities call for recognition of non-economic and spiritual harm that may be caused by illicit uses of TCEs. An option for States could be to provide statutory means for recognizing such non-economic and spiritual harm in appropriate cases.

Time period of protection: a choice lies between unlimited protection, or protection with a well-defined term. If States wish to provide indefinite protection, options could include: legislation simply providing for indefinite protection or making no mention of any time limit; protection could be unlimited in time in so far as existing TCEs go, but be limited for some time period in the future; the period of protection could be linked to the lifespan of a particular community or tradition that the TCE is identified with or to continuing use of the TCE by the relevant community. Some proposals for protection may aim to have retrospective application, which raises questions about legitimate interests of third parties.

Folklore shared within a country and 'regional folklore': options could include: co-ownership of rights; allowing communities separately to hold rights in the same or similar TCEs; vesting rights in the State or statutory body. Dispute resolution could include references to customary laws and practices. Regarding 'regional folklore' in particular, options include national and/or international folklore databases, alternative dispute resolution (ADR), systems of registration and notification, collective management and the establishment of dispute-resolution organizations. Existing regional organizations and mechanisms could be helpful.

Performances of traditional literary and artistic productions: the WPPT, 1996 already provides international protection for performances of 'expressions of folklore.' States which have not yet done so could implement this protection.

Documentation: the documentation and recording of traditional literary and artistic productions for IP protection purposes (as opposed to preservation purposes) seems to stand in contradiction to the oral and 'living' nature of cultural materials. And copyright in the documentation, recordings and databases may not vest in the relevant communities. Care should be taken, therefore, whether documentation/recording is useful as an IP strategy. The software and digital rights management tools, and evolving protection of databases, may be useful options. Cultural heritage inventories and registers could also help identify traditional owners and applicable customary laws for IP purposes.

Prevention of insulting, derogatory and culturally/spiritually offensive uses: options include communal moral rights and a register containing TCEs that communities do not wish used commercially or as part of any IP subject matter.

Options for protection of handicrafts

191. States have called for specific attention to be paid to handicrafts,⁹² and in particular the need to protect their 'style.'⁹³

192. In more general terms first, and in a similar way to the treatment of contemporary literary and artistic productions under copyright, there are examples showing that traditional yet 'contemporary' designs are protectable by industrial designs law. The IP protection of contemporary adaptations of traditional designs rewards forward-looking creativity and

⁹² Asian Group, WIPO/GRTKF/IC/1/13, para. 22),

⁹³ GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p.5).

innovation, and can support the economic development of traditional individuals and their communities.

193. Again, as in the case of literary and artistic works, truly old and communal designs may not be protectable, and designs embodied in hand-woven textiles and handicrafts may not be protected in countries requiring that industrial designs be capable of industrial replication.

194. Yet, design protection appears well suited to protecting the design, shape and visual characteristics of craft products especially where the crafts products are of utilitarian nature and cannot be considered works of art and therefore eligible for copyright protection. Yet for those tradition-based designs that are protectable under design law, the limited term of protection available under conventional design law does not meet all stakeholders' needs. The options in this respect are similar to those in copyright and have also been referred to in previous documents.⁹⁴

195. Existing *sui generis* systems cover also traditional designs. In brief:

- (i) the Model Provisions provide for the protection of designs as tangible expressions of folklore⁹⁵ against their unauthorized reproduction or use;
- (ii) the Panama Law refers explicitly refers to traditional textile and dress designs. The "Provisions on the Protection, Promotion and Development of Handicraft"⁹⁶ protects national handicrafts by prohibiting the import of craft products or the activities of those who imitate Indigenous and traditional Panamanian articles and clothing.

196. Apart from copyright and designs laws, the law of unfair competition and marketing laws can be of assistance (see below). Some indigenous groups have also registered certification trademarks to regulate the marketing of traditional arts and crafts (see below).

Imitation of 'style'

197. One of the claims most frequently heard is that the 'style' of an Indigenous production has been imitated or misappropriated.

198. Designs and copyright protection do not extend to utilitarian aspects, concepts, formulaic or other non-original elements, colors, subject matter and techniques used to create a work. Copyright and designs laws permit the imitation of the non-original elements or underlying ideas and concepts of works, which is a widespread practice as creativity is nourished and inspired by other works. Elements of style may of course be protected to the extent that a style incorporates original expression.

199. Once again, other branches of IP law may be more useful, however, such as the law of unfair competition, and the common-law tort of passing off.

⁹⁴ See WIPO/GRTKF/IC/5/3, paras. 184 to 186.

⁹⁵ See Section 2 of the Model Provisions

⁹⁶ Panama Law No. 27 of July 24, 1997.

Issues and options: protection against imitation of ‘style’

Protection against the imitation of the ‘style’ of handicrafts and other TCEs could be based on unfair competition law, or distinct laws for protection based upon unfair competition principles.

False and misleading claims as to authenticity and origin/failure to acknowledge source

200. While some of the above examples are of the protection of traditional signs themselves, trademarks can also be used to protect the reputation associated with TCEs. The protection of reputation (the distinctiveness, ‘style’ and ‘authenticity’) of TCEs has emerged as perhaps one of the most critical needs of TCE custodians.

Certification marks

201. In Australia, certification marks have been registered by the National Indigenous Arts Advocacy Association (NIAAA)⁹⁷ and in New Zealand the Maori Arts Board, *Te Waka Toi*, is making use of trademark protection through the development of the *Toi Iho*™ Maori Made Mark.⁹⁸

‘Truth in advertising’ and labeling laws

202. The Indian Arts and Crafts Act, 1990 (the IACA) of the U.S.A. protects Native American artisans by assuring them the authenticity of Indian artifacts under the authority of an Indian Arts and Crafts Board. The IACA, a “truth-in-marketing” law, prevents the marketing of products as “Indian made” when the products are not made by Indians as they are defined by the Act.⁹⁹

Geographical indications

203. Several Committee participants have highlighted the potential use of geographical indications in this area. Some TCEs, such as handicrafts made using natural resources, may qualify as “goods” which could be protected by geographical indications. In addition, some TCEs may themselves be geographical indications, such as indigenous and traditional names, signs and other indications. Portugal, Mexico and the Russian Federation have provided relevant examples of the registration of geographical indications with respect to TCEs and related TK.¹⁰⁰

⁹⁷ See *Minding Culture* case studies by Terri Janke, “Indigenous Arts Certification Mark”, <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>

⁹⁸ For more information on the *Toi Iho*™ Mark see <<http://www.toiiho.com>>

⁹⁹ WIPO/GRTKF/IC/3/10, par. 122 (i).

¹⁰⁰ See WIPO/GRTKF/IC/5/3.

Unfair competition or trade practices law

204. In a recent case under trade practices law, a company in Australia was prevented from continuing to describe or refer to its range of hand painted or hand carved Indigenous oriented souvenirs as ‘Aboriginal art’ or ‘authentic’ unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent. Proceedings were instituted against the company because it represented that some of its hand painted Aboriginal-style souvenirs were ‘authentic,’ ‘certified authentic’ and/or ‘Australian Aboriginal art,’ and it was held that these representations were likely to mislead consumers because the majority of the pool of artists who produced the souvenirs were not Aboriginal or of Aboriginal descent.¹⁰¹

<i>Options and issues: false and misleading claims as to authenticity and origin</i>
The options include:
- Encouraging communities to register certification trademarks;
- Exploring possibilities under trade practices and labeling laws;
- Exploring further the use of geographical indications by communities;
- Promoting use of unfair competition laws or developing systems based upon unfair competition principles.

Traditional words, names, symbols and other distinctive signs

205. Indigenous peoples and traditional communities are concerned with non-Indigenous companies and persons using their words, names, designs, symbols, and other distinctive signs in the course of trade, and registering them as trademarks. At the same time, they argue that they themselves cannot protect their words and symbols using existing trademark laws as they are not sufficiently adapted to their needs. As with other areas, the needs of communities could be described as for ‘positive protection’ and ‘defensive protection.’

206. These issues are closely linked to protection of the reputation and distinctiveness of TCEs, often embodied in their ‘style’ and/or ‘authenticity.’ This important issue is treated separately above.

207. Certain regional organizations and States have already taken steps to prevent the unauthorized registration of Indigenous marks as trademarks. Although these are reported on in detail in previous documents, this information is repeated here because these measures are existing *sui generis* mechanisms that may offer practical and empirical examples for other States wishing to establish similar mechanisms:

(i) Article 136(g) of Decision 486 of the Commission of the Andean Community provides that “signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their

¹⁰¹ See further WIPO/GRTKF/IC/5/3 and <<http://www.accc.gov.au/>> (April 7, 2003).

culture or practice, except where the application is filed by the community itself or with its express consent;”

(ii) the United States Patent and Trademark Office (the USPTO) has established a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes.¹⁰² The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe;¹⁰³ and

(iii) the New Zealand Trade Marks Act requires the registration of a trademark (or part of a trademark) to be refused if its use or registration is considered likely to offend a significant section of the community, including the Indigenous people of that country, the Maori.¹⁰⁴

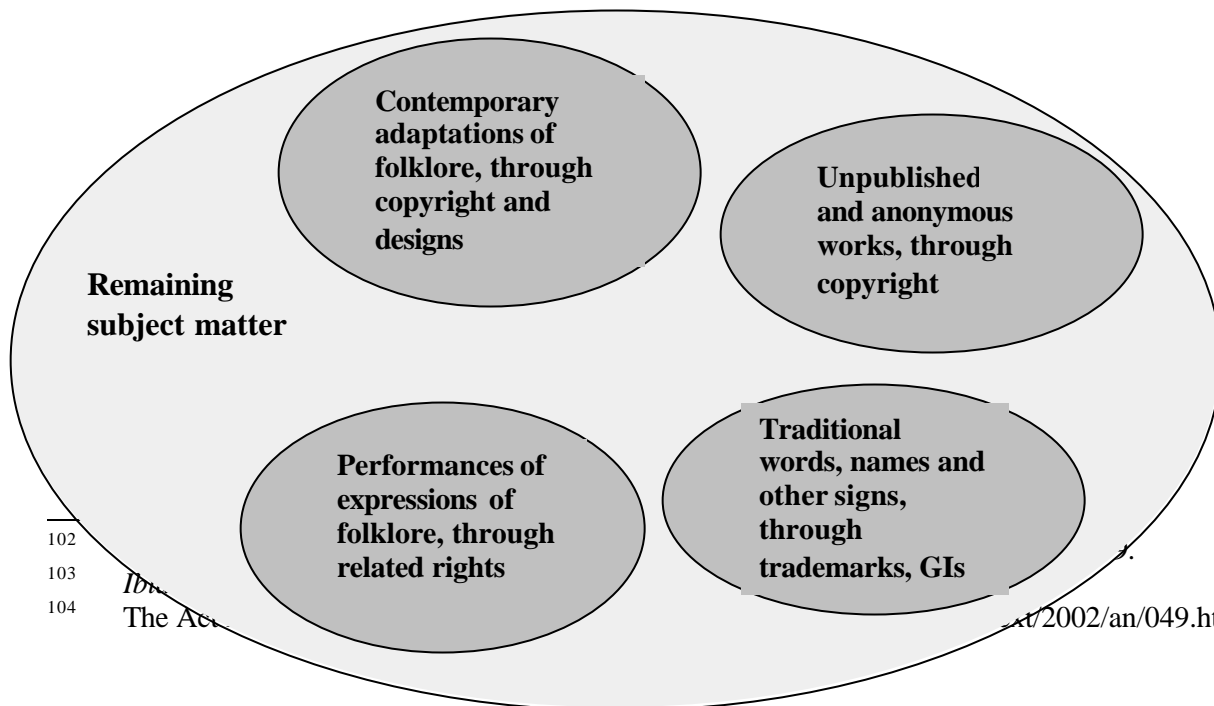
Options and issues: traditional words, names, symbols and signs

The options include:

- (i) specific legislation or legislative amendments to prevent or regulate the granting of trademark rights over traditional symbols;
- (ii) the development of registers in which communities could register words, names, symbols and signs that they would not wish form part of a registered trademark.

Diagram: Intellectual property and expressions of folklore/traditional cultural expressions.

Shaded areas (■) show folkloric/tradition-based cultural materials already receiving positive IP protection under current national IP laws and international treaties.



¹⁰²

¹⁰³

¹⁰⁴

Id.
The Act

V. PRACTICAL STEPS FOR SETTING OVERALL DIRECTIONS

208. Based upon the preceding materials, the following series of steps may help policymakers 'navigate' their way through these questions and illustrate the available options:

Step One: determine national policy objectives, including the needs of communities and groups that are the holders and custodians of folklore. Are they related to IP (or more concerned with other policy goals such as preservation of cultural heritage?). What subject matter is to be protected? Against which acts is protection sought? Is the protection aimed at positive or defensive protection, or a combination of the two?

Step Two: identify the policy considerations that may be relevant to framing overall directions (examples: promotion of cultural diversity; stimulation of cultural industries for economic development; preservation of cultural heritage; safeguarding of a vibrant and multicultural public domain: protection of cultural rights; protection of indigenous peoples' human rights, etc).

Step Three: identify options available under conventional IP systems, including unfair competition, as well as options for adapted or modified elements of existing IP.

Step Four: analyze options available in non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws, and indigenous and customary laws.

Step Five: determine whether a stand-alone *sui generis* system is necessary, or whether uses that can be made of existing rights and modifications to them, meet the needs identified and strike the right balances. If so, how would a *sui generis* system relate to conventional IP systems particularly in respect of overlapping subject matter?

Step Six: identify which practical and operational measures, institutions and programs may be needed to facilitate the effective use and implementation of the forms of protection already in place or to be established.

Step Seven: establish how national systems would interact with each other to provide regional and international protection, through bilateral, regional or international legal frameworks.

VI. CONCLUSIONS

209. This document has explored some of the policy objectives and general principles that have been drawn on in applying IP protection to EoF/TCEs in a wide range of Member States. These objectives and principles are closely related to the core principles of the IP system more generally.

210. It may therefore be timely for the Committee to set out a range of objectives and core principles that should guide WIPO's future work, policy dialogue, capacity-building and technical cooperation on the protection of EoF/TCEs. These core principles could then be supplemented by an outline of policy options and legal mechanisms, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option. This analysis could also clarify the overlap and interface between conventional and *sui generis* approaches to protection, and the relationship between IP and non-IP forms of protection. This outline and analysis would provide a succinct basis for future substantive work, including national policymaking, regional cooperation and WIPO's legal-technical assistance, and would also provide a clear framework for continuing international dialogue on policy options and possible international coordination, should the Committee decide to produce concrete material.

211. *The Intergovernmental Committee is invited to:*

(i) *consider and comment on the contents of this document and their implications for intellectual property and the protection of TCEs;*

(ii) *consider the possibilities for focussing and accelerating the substantive work of the Committee on TCEs, including the preparation of drafts of:*

- an overview of policy objectives and core principles for protection of TCEs; and*
- an outline of the policy options and legal mechanisms for the protection of TCE subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.*

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