

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

**Thirty-Seventh Session**  
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### **THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: UPDATED DRAFT GAP ANALYSIS**

*Document prepared by the Secretariat*

1. At its Twelfth Session, held in Geneva from February 25 to 29, 2008, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) decided that the Secretariat would, taking into account the previous work of the IGC, prepare, as a working document for the Thirteenth Session of the IGC, a document that would:
  - (a) describe what obligations, provisions and possibilities already exist at the international level to provide protection for traditional cultural expressions (TCEs);
  - (b) describe what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples;
  - (c) set out considerations relevant to determining whether those gaps need to be addressed;
  - (d) describe what options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level;
  - (e) contain an annex with a matrix corresponding to the items mentioned in subparagraphs (a) to (d), above.
2. The Secretariat was required to “make explicit the working definitions or other bases upon which its analysis is conducted.”
3. A first draft of the gap analysis on the protection of TCEs was prepared by the Secretariat at that time and circulated amongst IGC participants for comments. Taking into

account comments received,<sup>1</sup> a further draft of the gap analysis was prepared and made available as document WIPO/GRTKF/IC/13/4(b) Rev. for the Thirteenth Session of the IGC, which took place from October 13 to 17, 2008.

4. The same decision had been taken by the Twelfth Session of the IGC at that time concerning traditional knowledge (TK), so that for the Thirteenth Session of the IGC, there were two draft gap analyses before the IGC, contained in documents WIPO/GRTKF/IC/13/4(b) Rev. (for TCEs) and WIPO/GRTKF/IC/13/5(b) Rev. (for TK).

5. By that stage, the IGC had extensively reviewed legal and policy options for the protection of TCEs. This review had covered comprehensive analyses of existing national and regional legal mechanisms, panel presentations on diverse national experiences, common elements of protection of TCEs, case studies, ongoing surveys of the international policy and legal environment as well as key principles and objectives of the protection of TCEs that received support in the Committee's earlier sessions. As had been requested by the Committee, this earlier foundational work was summarized in document WIPO/GRTKF/IC/13/4(a), which accompanied the draft gap analysis in document WIPO/GRTKF/IC/13/4(b) Rev.

6. In 2017, the WIPO General Assembly requested the Secretariat to "update the 2008 gap analyses on the existing protection regimes related to TK and TCEs."

7. Pursuant to this decision, Annex I of this document comprises an updated draft of the 2008 gap analysis on the protection of TCEs. The structure, format and contents of the earlier gap analysis are largely unchanged, save where more recent international instruments or legislative or policy developments are reflected. This version is, therefore, as requested by the IGC, essentially an "updating". In particular, changes have been made to paragraphs 1, 2, 6-8, 10, 13, 14, 17, 19-21, 24, 35, 38, 41-43, 45-47, 48, 50, 51-53, 57, 58, 61-64, 71-73, 78, 79, 85, 86, 88, 91, 96, 100, 101, 104, 106-108, 110, and 113. Annex II provides an updated matrix corresponding to the items mentioned in subparagraphs (a) to (d), above.

8. The Thirteenth Session of the IGC in October 2008 did not discuss document WIPO/GRTKF/IC/13/4 (b) Rev. at length<sup>2</sup> and the decisions of that session only reflect that it "took note" of the document.<sup>3</sup> The IGC did not decide to consider the document at future sessions.

*9. The Committee is invited to consider the updated draft gap analysis contained in Annexes I and II.*

[Annexes follow]

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<sup>1</sup> The comments received at that time are still available on the WIPO website at <http://www.wipo.int/tk/en/igc/gap-analyses.html>.

<sup>2</sup> WIPO/GRTKF/IC/13/11.

<sup>3</sup> WIPO/GRTKF/IC/13/DECISIONS.

ANNEX I

UPDATED DRAFT GAP ANALYSIS  
ON THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS:

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## I. REFERENCES AND OTHER MATERIALS USED FOR PREPARATION OF THIS ANALYSIS

1. Much of the information contained in this document has been drawn from earlier IGC documents<sup>4</sup> and other publications and materials previously written for purposes of the work of the IGC.<sup>5</sup> In particular, attention is drawn to document WIPO/GRTKF/IC/6/3. These documents and materials are all available on WIPO's website at <http://www.wipo.int/tk/en/folklore/>. Several other publications, documents and articles have also been consulted.<sup>6</sup>

## II. WORKING DEFINITIONS AND OTHER BASES UPON WHICH THE ANALYSIS IS CONDUCTED

### Traditional cultural expressions

2. There is no internationally settled or accepted definition of a "traditional cultural expression" or "expression of folklore" (both terms will be used interchangeably in this document and abbreviated to "TCEs"). There are, however, many definitions in national and regional laws and in international instruments.<sup>7</sup>

3. Defining the subject matter of protection has long been one of the most fundamental challenges associated with the protection of TCEs. How TCEs are defined can determine the extent to which and how they may be protected by IP. While this draft analysis does not seek to suggest a particular definition of TCEs, some understanding of what is meant by the term is indispensable to the preparation of the analysis.

4. It is not therefore the purpose of this document to suggest a single definition or even suggest that a definition is necessary at the international level, a question on which participants in the IGC have different views. However, for purposes of this analysis only, it is useful to delineate what is meant by the term "traditional cultural expression".

### *Characteristics of TCEs*

5. The characteristics of TCEs have been discussed at length in earlier documents and materials.<sup>8</sup>

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<sup>4</sup> WIPO/GRTKF/IC/3/10; WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/5/INF/3; WIPO/GRTKF/IC/6/3 and 6/3 Add.; WIPO/GRTKF/IC/7/3; WIPO/GRTKF/IC/9/INF/4; WIPO/GRTKF/IC/11/4(a), (a) Add. and (a) Add. 2; WIPO/GRTKF/IC/11/4(b); WIPO/GRTKF/IC/12/4(a), (b) and (c).

<sup>5</sup> WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, 2004; Janke, "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions", WIPO, 2003; Kutty, "National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions – India, Indonesia, the Philippines", WIPO, 2004.

<sup>6</sup> McDonald, I., Protecting Indigenous Intellectual Property (Australian Copyright Council, Sydney, 1997, 1998); Palethorpe and Verhulst, "Report on the International Protection of Expressions of Folklore Under Intellectual Property Law" (Study Commissioned by the European Commission), October 2000; "Protecting Traditional Cultural Expressions: Policy Issues and Considerations from a Copyright Perspective", policy paper by Canadian Heritage, 2004; Lucas-Schloetter, A., 'Folklore' in von Lewinski, S. (Ed.), *Indigenous Heritage and Intellectual Property*, 2004; Chair's Information Note on TCEs for IGC 34 available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=373916](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=373916).

<sup>7</sup> WIPO/GRTKF/IC/3/9; WIPO/GRTKF/IC/9/INF/4. See also laws database at <http://www.wipo.int/tk/en/databases/tklaws/>.

<sup>8</sup> WIPO/GRTKF/IC/6/3; WIPO, Consolidated Analysis.

6. For purposes of this analysis, two points may be recalled. First, TCEs may comprise pre-existing materials dating from the distant past that were once developed by “authors unknown” through to the most recent and contemporary expressions of traditional cultures, with an infinite number of incremental and evolutionary adaptations, imitations, revitalizations, revivals and recreations in between. TCEs, part of living heritage, are constantly recreated by communities and groups in response to their environment and their interaction with nature and their history, and provide them with a sense of identity and continuity. A distinction may, therefore, be made between pre-existing TCEs and contemporary interpretations and adaptations of them.

7. Second, while traditional creativity is a dynamic interplay between collective and individual creativity, the defining characteristic of “traditional” creations is that they identify a living tradition and a community that still bears and practices it. Even where an individual has developed a tradition-based creation within his or her customary context, the creation is not “owned” by the individual but falls within a shared sense of communal responsibility, identity and custodianship. This is what marks such a creation as “traditional”.

8. In summary, in general terms TCEs:

- (a) are the products of creative intellectual activity,
- (b) have been handed down from one generation to another, either orally or by imitation,
- (c) reflect a community’s cultural and social identity,
- (d) consist of characteristic elements of a community’s heritage,
- (e) are often made by authors unknown and/or unlocatable and/or by communities,
- (f) are often primarily created for spiritual and religious purposes,
- (g) often make use of natural resources in their creation and reproduction, and
- (h) are constantly evolving, developing and being recreated within the community.

9. The term “community” is used in this draft analysis, in line with past practice in documents prepared for the IGC, to refer broadly to indigenous peoples and traditional, local and other cultural communities. The use of these terms is not intended to suggest any consensus among the IGC members on the beneficiaries of the protection of TCEs and/or of the validity or appropriateness of these or other terms. The use of these terms for purposes of this analysis does not affect or limit the use of other terms in national or regional laws and processes.

#### *Forms of TCEs*

10. TCEs could conceivably include a wide range of tangible, intangible and mixed forms of creative expression.<sup>9</sup>

11. It is proposed, however, that this analysis be as focused and concrete as possible by addressing certain specific TCEs which appear to be the most vulnerable to IP-style exploitation. Previous materials have identified and discussed actual examples of the appropriation and misappropriation of TCEs.<sup>10</sup> These examples have referred to the exploitation of traditional music and songs, visual art (notably painting), traditional musical instruments, handicrafts (including the designs and “styles” embodied in them), performances of TCEs, sacred and secret TCEs, recordings and documentation of TCEs, and indigenous

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<sup>9</sup> See List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May Be Found, WIPO/GRTKF/IC/17/INF/9.

<sup>10</sup> WIPO/GRTKF/IC/5/3; WIPO, Consolidated Analysis.

words, names and symbols.

12. These examples demonstrate that the protection of TCEs may refer to protection of (i) the creative and distinctive expressions themselves; and/or (ii) the reputation or distinctive character associated with them; and/or (iii) their method of manufacture (such as in the case of handicrafts, musical instruments and textiles, for example).

13. The third category relating to the method of manufacture of TCEs such as crafts, musical instruments and textiles refers more to what is treated as “traditional knowledge” *stricto sensu* (TK) in the Committee’s work. TK is addressed in a coordinated and complementary manner in document WIPO/GRTKF/IC/37/6. [Note from the Secretariat: this too is an updated version of the TK gap analysis prepared in 2008, as explained above).

14. With this background, it is proposed to focus this analysis on concrete examples falling within the first two categories mentioned, as follows:

- (a) literary and artistic productions,<sup>11</sup> such as music and visual art;
- (b) performances of TCEs;
- (c) designs embodied in handicrafts and other creative arts;
- (d) secret TCEs; and
- (e) indigenous and traditional names, words and symbols.

15. This focus is intended to enable this analysis to be as concrete and specific as possible. It does not, however, suggest that there are not other forms of TCEs and elements of the intangible cultural heritage that are also valuable and vulnerable.

### *The meaning of “protection”*

#### *General features of intellectual property protection*

16. IP systems are diverse in nature and in terms of the policy goals they seek to achieve. Copyright, for example, is the right of an author to control the exploitation of his or her intellectual creations. Copyright does not, however, provide perfect control as it is subject to various exceptions and limitations designed to balance the needs to protect creativity and disseminate information. The protection of trademarks and geographical indications, on the other hand, is aimed at the protection of the goodwill and reputation of traders and their products and to prevent the unauthorized use of such signs which is likely to mislead consumers.

17. IP protection may comprise property rights. Where property rights do exist, such as economic rights under copyright, they enable the rights holder either positively to exercise the rights himself or herself, to authorize others to do so (i.e., the right can be licensed), and/or to prevent others from doing so.

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<sup>11</sup> According to Article 2 of the Berne Convention for the Protection of Literary and Artistic Works, “literary and artistic works” shall include every production in the literary scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture and science.”

18. IP protection does not necessarily comprise the grant of property rights – for example, moral rights under copyright provide control over how a work is used, rather than whether or not it may be used, in some cases even after the expiry of the economic rights. Compulsory (non-voluntary) licenses in copyright similarly allow regulation of how a work is used and for the payment of an “equitable remuneration” or a “reasonable royalty” (see, for example, Articles 11 *bis* (2) and 13.1 of the Berne Convention, 1971).

*Forms of IP protection most relevant to TCEs*

19. As many TCEs are literary and artistic works and performances, copyright and related rights are particularly relevant for the protection of TCEs.<sup>12</sup> Traditional designs are potentially protectable as industrial designs. In so far as names, signs and symbols are concerned, IP systems which protect marks and indications, as well as laws relating to unfair competition, are the most relevant.

*Relevant international IP conventions and treaties*

20. The copyright and related rights conventions and treaties administered by WIPO provide an international framework of principles and standards which ratifying States implement in national laws. The international conventions and treaties provide for flexibility on a range of issues and, therefore, national legislation can differ widely from one jurisdiction to another. In practice, therefore, IP protection is first and foremost a matter for domestic law. International treaties also, importantly, facilitate enforcement of rights in foreign jurisdictions on the basis of national treatment and reciprocity.

21. The main international IP conventions and treaties that will be referred to in this analysis are:

- (a) the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention, 1961”);
- (b) the Paris Convention for the Protection of Industrial Property, 1967 (the “Paris Convention, 1967”);
- (c) the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the “Berne Convention, 1971”);
- (d) the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (the “Phonograms Convention, 1971”);
- (e) the TRIPS Agreement, 1994;
- (f) the WIPO Copyright Treaty, 1996 (the “WCT, 1996”);
- (g) the WIPO Performances and Phonograms Treaty, 1996 (the “WPPT, 1996”); and,
- (h) the Beijing Treaty on Audiovisual Performances, 2012 (the “Beijing Treaty, 2012”) (treaty not yet in force).<sup>13</sup>

*“Protection” and not “safeguarding”, “preservation” or “promotion”*

22. In line with previous discussions within the Committee, the word “protection” in the decision of the Committee taken at its Twelfth Session in February 2008 is understood to

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<sup>12</sup> Previous documents set out the basic principles of copyright and related rights and applied them to TCEs. See document WIPO/GRTKF/IC/6/3.

<sup>13</sup> Note that the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Disabled, 2013, is not mentioned as it has no bearing on TCEs.

mean protection in an IP sense (sometimes referred to as “legal protection”), i.e., protection of human intellectual creativity and innovation against unauthorized use.

23. IP “protection” in this sense is distinguishable from the “safeguarding”, “preservation” and “promotion” of cultural heritage, which refer generally to the identification, documentation, transmission and revitalization of tangible and intangible cultural heritage in order to ensure its maintenance or viability. While instruments and programs for the preservation and promotion of TCEs as such are valuable and complement the protection of TCEs, consistent with the February 2008 decision of the Committee the focus of this analysis is on the legal protection of TCEs. Non-IP laws and programs dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with IP protection. Many of the aspirations relating to TCEs referred to by communities might be addressed not by IP-type measures but by measures and programs for the safeguarding, preservation and promotion of cultural heritage. Furthermore, communities use other tools, such as those developed under their customary laws, to prevent the undesired use of their TCEs. It has also been pointed out that the appropriate use of traditional names, words and symbols and other TCEs can help to preserve and promote indigenous cultures.

*Objectives in relation to the protection of TCEs*

24. Previous documents have cited a variety of objectives which States and communities have identified in relation to TCEs.<sup>14</sup> Some of these are general objectives while others are more directly related to IP and the protection of TCEs. Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples has been cited as a source that reflects the aspirations of indigenous peoples.

25. To provide this analysis with an appropriately specific focus, and in line with previous discussions and the IGC’s decision of February 2008, it is proposed that the immediate focus of this analysis be on those objectives that are specifically related to the IP protection of TCEs.

26. It is recalled that, taking into account that there are also non-IP options, IGC participants have cited various IP-related economic and non-economic objectives in relation to TCEs, such as:

- (a) IP protection to support economic development: some communities wish to claim and exercise IP in their TCEs to enable them to exploit them commercially as a contribution to their economic development;
- (b) IP protection to prevent unwanted use by others: some communities may wish to exercise IP rights in TCEs in order to prevent the use and commercialization of their TCEs by others, including culturally offensive or demeaning use, and use that inaccurately represents their cultures; and,
- (c) protection against IP: communities are also concerned to prevent others from gaining or maintaining IP over TCEs and derivations and adaptations of them. 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, or IP rights that have been obtained without the consent of the community (“defensive protection”).

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<sup>14</sup> WIPO/GRTKF/IC/6/3.

*Specific forms of protection desired for TCEs*

27. The ways in which different forms of TCEs are used around the world are varied. Previous Committee documents set out examples of the kinds of appropriations of cultural expressions that indigenous communities draw attention to.<sup>15</sup>

28. These actual examples suggest that such communities and other stakeholders call for:

- (a) protection of TCEs against unauthorized use, such as reproduction, adaptation, distribution, performance and other such acts, especially commercial use;
- (b) prevention of insulting, derogatory and/or culturally and spiritually offensive uses of TCEs;
- (c) prevention of the 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 “style;”
- (d) prevention of the failure to acknowledge source when TCEs are used;
- (e) defensive protection of TCEs (meaning, the protection of TCEs against the obtaining of IP rights over the TCEs or adaptations thereof); and
- (f) unauthorized disclosure of confidential or secret TCEs.

29. To clarify options and to give this analysis a practical and applied focus, it is proposed to base this analysis on these six main forms of protection as identified and discussed in previous documents.

30. In respect of defensive protection of TCEs, it is proposed to focus specifically on calls for the protection against the unauthorized (i) exercise of copyright and design rights in works derived from TCEs, including handicrafts, and (ii) acquisition of trademark protection in respect of indigenous and traditional names, words and symbols.

*The meaning of “gaps”*

31. The decision of the IGC at its Twelfth Session requires an analysis of “gaps” in relation to “obligations, provisions and possibilities which already exist at the international level to provide protection for TCEs/EoFs.”

32. The use of the notion “gap” in the IGC’s decision implies an unmet economic, cultural or social need. Identifying such economic, cultural or social needs and assessing whether or not they are “unmet” is an uncertain exercise as there is not yet agreement within the IGC on these issues. Identifying an unmet need as a “gap” and, above all, determining whether or not it should be filled, is a matter for decision by Member States.

33. Proceeding pragmatically, however, in order to respond to the IGC’s decision, identifying gaps could be undertaken with reference to:

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<sup>15</sup> WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

- (a) the forms of protection desired by States and communities (referred to above); and/or
- (b) specific technical perceived shortcomings of the existing IP system in relation to TCEs. Previous completed questionnaires and in other documents and materials prepared for the IGC have cited and discussed these at length.<sup>16</sup>

34. The desired forms of protection have been identified above. The following have been suggested as specific, technical limitations of the IP systems most relevant to TCEs:

- (a) *The “originality” requirement:* copyright protects only “original” works, and many traditional literary and artistic productions are not “original” in this sense. Similarly, it has been suggested that traditional designs are not “new” or “original” for industrial designs protection. On the other hand, adaptations of TCEs can be protected as “original” copyright works and designs, leading to calls for “defensive protection” (see further below);
- (b) *“Ownership”:* the exercise of copyright and industrial designs protection often requires the identification of a known individual creator or creators in order to determine the holders of rights and to identify precisely who might benefit from such rights. It is difficult, if not impossible, however to identify the creators of TCEs, and hence the rights holders and beneficiaries in TCEs, because TCEs are communally created and held and/or because the creators are simply unknown and/or unlocatable. The very concept of “ownership” in the IP sense may also be alien to many indigenous peoples (see further under “Conceptual divide” below);
- (c) *Fixation:* the fixation requirement in many national copyright laws prevents intangible and oral expressions of culture, such as tales, dances or songs, from being protected unless and until they are fixed in some form or media. Even certain “fixed” expressions may not meet the fixation requirement, such as face painting, body painting and sand carvings. Yet, on the other hand, rights in recordings and documentation of TCEs vests in the person responsible for these acts of fixation, such as ethnomusicologists, folklorists and other researchers and not in the TCE bearers;
- (d) *Term of protection:* the limited term of protection in copyright, related rights and industrial designs protection is claimed to be inappropriate for TCEs. First, it fails to meet the need to protect TCEs in perpetuity or at least as long as the community exists. And, the limited term of protection requires certainty as to the date of a work’s creation or first publication, which is often unknown in the case of TCEs;
- (e) *Formalities:* while there are no formalities in copyright and related rights, there are registration and renewal requirements attached to industrial designs and trademarks protection. Such requirements have been suggested to be obstacles to the use of these IP systems by indigenous and traditional communities;
- (f) *Exceptions and limitations:* aside from the limited term of protection for most forms of IP, it has been argued that other exceptions and limitations typically found in IP laws are not suitable for TCEs. For example, typical copyright 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 might disturb indigenous sensibilities and undermine customary rights. Similarly, national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. Some of these exceptions and limitations have been criticized by indigenous and traditional communities, and others have stressed the need for any exceptions and limitations

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<sup>16</sup> For example: WIPO/GRTKF/IC/1/5; WIPO/GRTKF/IC/3/11; WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/6/3.

to take into account the public interest; and,

- (g) *Defensive protection*: Indigenous peoples and communities are concerned with non-indigenous companies and persons imitating or copying their TCEs or using them as a source of inspiration, and acquiring IP protection over their derivative work, design, mark or other production. For example, communities have expressed concerns over the use by external parties of words, names, designs, symbols, and other distinctive signs in the course of trade, and registering them as trademarks. Furthermore, neither copyright nor industrial designs laws protect the “style” of literary and artistic works and designs, respectively.

*Gaps not directly addressed in this analysis*

35. *Conceptual divide*: The suggested focus on these specific and technical perceived shortcomings in existing IP systems is not intended to distract from more profound conceptual divergences between the aspirations and perspectives of indigenous peoples and the conventional IP system. Further, the links between conceptual divergences and technical shortcomings are recognized. Indigenous participants in the Committee and elsewhere have clearly expressed their doubts that the conventional IP system can meet their fundamental needs. For example, it has been stated that the very conception of “ownership” in the conventional IP system is incompatible with notions of responsibility and custodianship under customary laws and systems. While copyright confers exclusive, private property rights in individuals, indigenous authors are subject to dynamic complex rules, regulations and responsibilities, more akin to usage or management rights, which are communal in nature.<sup>17</sup>

36. This analysis cannot fully address let alone offer solutions for these more fundamental differences. The copyright system is intended, in essence, to permit the commercial exploitation of creative works in as fair and balanced a manner as possible. On the other hand, many TCEs are created primarily for spiritual and religious purposes and not to reach as broad a public as possible. As has been discussed previously in the Committee,<sup>18</sup> indigenous communities’ needs with respect to their TCEs that cannot be met within an IP framework could perhaps be met through the establishment of a *sui generis* IP system and/or through use of non-IP mechanisms, such as laws relating to blasphemy, cultural and other human rights, dignity, cultural heritage preservation, defamation, rights of publicity, and privacy. The UN Declaration on the Rights of Indigenous Peoples has been cited as a source that reflects the aspirations of indigenous peoples in this regard.

37. *Operational divide*: Second, the fact-finding work undertaken by WIPO at the outset of this program of work in 1998 and 1999<sup>19</sup> highlighted that obstacles to the effective use of IP tools by indigenous and local communities include, perhaps most importantly, practical and operational obstacles, such as lack of access to appropriate legal advice and the financial means to acquire and enforce rights. Janke in her studies for WIPO testifies to these operational obstacles, for example, in her chapter on “Use of Trade Marks to Protect Traditional Cultural Expressions”. Numerous suggestions have been made to address these obstacles, including the use of alternative dispute resolution (ADR).<sup>20</sup> These operational obstacles are not the focus of this analysis.

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<sup>17</sup> See WIPO/GRTKF/IC/3/11, page 3; McDonald, p. 45.

<sup>18</sup> WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

<sup>19</sup> WIPO, Fact-finding Mission Report; WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/5/3.

<sup>20</sup> WIPO, Fact-finding Mission Report; WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/3/15.

38. *Shared TCEs*: Third, a significant and recurring problem with regard to the protection of TCEs is locating ownership of TCEs that are shared by more than one community either in the same national territory or in different territories. Options for addressing this issue include co-ownership of rights and allowing communities separately to hold rights in the same or similar TCEs. Emphasis has been placed on allowing customary laws and protocols to be a determinant. A further possible solution to this issue is to vest the rights in the State or statutory body. Existing regional organizations and mechanisms may also be important actors in resolving the “regional folklore” question.

39. *Gaps inherent in IP systems*: Finally, there is an attempt to highlight both (i) gaps specific to TCEs and (ii) gaps in the protection available to TCEs that are inherent to the IP system and not specific to TCEs (such as the limitations and exceptions under copyright). The IP system is not a system of absolute control over the protected subject matter and especially the copyright and related rights systems are subject to a wide range of exceptions and limitations. The boundaries of IP systems, which include decisions about the scope of protectable subject, often reflect important policy considerations such as freedom of expression and the protection of the public domain. For a discussion of such policy considerations, see also below under “Policy questions”. For example, as one commentator noted, the use of other cultures as a source of inspiration is part of the creative process, and the use of the “style” of a TCE need not necessarily be considered a misappropriation, especially if the source of the TCE is acknowledged.

40. This draft analysis does not address these larger conceptual and operational gaps further. They are of considerable importance and relevance however and have been discussed by the Committee and could be discussed further.

#### *Gaps in the context of a tiered approach to scope of protection*

41. At its Twenty Seventh Session, the IGC introduced for discussion a tiered approach to scope of protection whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion. The tiered approach proposes differentiated protection along a spectrum from TCEs that are available to the general public to TCEs that are secret, sacred or not known outside the community and controlled by the beneficiaries. For example, it posits that exclusive economic rights might be appropriate for some forms of TCEs (for instance, secret and sacred TCEs), whereas a moral rights-based model might, for example, be appropriate for TCEs that are publicly available or widely known but still attributable to specific indigenous peoples and local communities.

42. It should be noted that in the context of a tiered approach to scope of protection, the gaps that could be identified at the international level are likely to be different, depending on the determination of the tiers, taking into account elements such as the nature and characteristics of the TCEs, the level of control retained by the beneficiaries, and their degree of diffusion.

#### Summary

43. The table below summarizes the structure of this analysis as suggested above. This methodical approach has been adopted to facilitate the preparation and reading of this analysis. However, in practice, the issues rarely arise in such a disaggregated and “neat” way. It may also be considered how extensively communities do or are able to take advantage of individual options that may exist within current IP systems. Furthermore, TCEs are often closely bound up with forms of TK (see WIPO/GRTKF/IC/37/6)). The approach

taken is, therefore, somewhat artificial when measured against what does or may happen in practice. However, it is suggested that such a methodical and structured approach may facilitate the discussions of the IGC.

TCE subject matter:	Desired protection:	Perceived shortcomings:
<ul style="list-style-type: none"> <li>(i) literary and artistic productions such as traditional music and visual art</li> <li>(ii) performances of TCEs</li> <li>(iii) designs</li> <li>(iv) secret TCEs</li> <li>(v) indigenous and traditional names, words and symbols</li> </ul>	<ul style="list-style-type: none"> <li>(i) protection of TCEs against unauthorized use</li> <li>(ii) prevention of insulting, derogatory and/or culturally and spiritually offensive uses of TCEs</li> <li>(iii) prevention of false and misleading claims to authenticity and origin</li> <li>(iv) the failure to acknowledge source when TCEs are used</li> <li>(v) defensive protection of TCEs</li> <li>(vi) unauthorized disclosure of confidential or secret TCEs</li> </ul>	<ul style="list-style-type: none"> <li>(i) the originality requirement</li> <li>(ii) ownership</li> <li>(iii) fixation</li> <li>(iv) term</li> <li>(vi) formalities</li> <li>(vii) exceptions and limitations</li> <li>(vii) defensive protection</li> </ul>

### III. THE ANALYSIS

#### A. Obligations, provisions and possibilities that already exist at the international level to provide protection for TCEs/EoFs

##### *Literary and artistic productions*

44. Literary and artistic productions are typically protected by copyright law, embodied, at the international level in the Berne Convention, 1971, the TRIPS Agreement, 1994 and the WCT, 1996. Therefore, in respect of *traditional* literary and artistic productions, reference is made to these international instruments.

45. Under these instruments, the following obligations, provisions and possibilities exist to protect literary and artistic TCEs:

- (a) Traditional literary and artistic productions which are sufficiently “original” and for which the author or authors are known, may be protected as copyright works. “Originality” is not defined in the relevant international treaties, nor is it generally defined in national laws. It is often a matter left for determination by the courts in relation to particular cases. It may be said in general, however, that a work is “original” if there is some degree of intellectual effort involved and it has not been copied from someone else’s work.<sup>21</sup> In general, a relatively low level of creativity is required in order to meet the originality requirement in copyright law. TCEs that are the original works of a specific community, in the sense that they are not copies of works of another person or persons, may therefore be sufficiently “original”. Case law from various jurisdictions, such as Australia,<sup>22</sup> China<sup>23</sup> and elsewhere,<sup>24</sup> has confirmed that contemporary expressions of traditional cultures, that are adaptations and interpretations inspired by or based upon pre-existing traditional literary and artistic productions, may be protected as copyright works. The protection discussed here is available for a contemporary literary and artistic production that incorporates new elements and in respect of which there is generally a living and identifiable author (or authors).<sup>25</sup> See below on the “gap” that exists in respect of literary and artistic productions passed down – substantially unchanged – from generation to generation.
- (b) Works which have not yet been “published” and which have “unknown authors” who are assumed to be nationals of a country of the Berne Union are protected as copyright works, under Article 15.4 of the Berne Convention, 1971. This Article was introduced into the Berne Convention in 1967 specifically to provide protection to TCEs which have no identifiable author. National legislation should designate a “competent authority” to represent the author in such cases, and other countries may be notified as to the authority through a written declaration made to the Director General of WIPO. Only one State has so far made such a Declaration, namely India, although some other countries have enacted protection based on Article 15.4. It is suggested that the designation of a competent authority referred to, the communication thereof to WIPO and the further

<sup>21</sup> Palethorpe and Verhulst, page 28; see also Ricketson, S. and Ginsburg, J., *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (New York, 2005), pp. 511 to 514.

<sup>22</sup> *M, Payunka, Marika and Others v. Indofurn Pty Ltd* 30 IPR 209; *Bulun Bulun v R & T Textiles Pty Ltd* (198) 41 IPR 513.

<sup>23</sup> Decision of Beijing Higher People’s Court, Case No. 246, 17 December 2003.

<sup>24</sup> Lucas-Schloetter, *op. cit.*, cases cited in footnote 238 and on pages 301 to 304.

<sup>25</sup> WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

communication thereof to other member countries are steps towards the practical implementation of the Article and are not constitutive of the protection itself provided for<sup>26</sup>. In other words, protection for unpublished works of unknown authors exists under the Convention; the designation of a competent authority and subsequent steps are simply designed to facilitate the implementation and enforceability of the protection. Under Article 7.3 of the Berne Convention, once the work is “lawfully made available to the public”, the period of protection will expire after 50 years. On the other hand, the 50 year term in the Convention is only a minimum term and Member States could in their national laws provide for a longer term (Article 7.6). A country could therefore, in theory, provide for a hundred year or even a thousand year term for works under Article 15.4. However, in international situations, the “comparison of terms” provision in Article 7.8 of the Convention would apply unless national legislation provides otherwise. This means that (i) the duration of protection is governed by the term in the country where protection is claimed, but (ii) if the term in that country is longer than the term in the country of origin of the protected work, then the shorter of the terms would apply. In practice, this means that a term longer than the minimum might only apply when both countries have provided for that longer term – if not, the shorter of the terms could apply. Article 20 of the Convention allows parties to enter into special agreements amongst themselves provided that such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to the Convention. Article 7.3 provides that countries are not required to protect anonymous works in respect of which it is reasonable to presume that the author has been dead for 50 years.

- (c) Collections, compilations and databases of TCEs, whether pre-existing or contemporary, may be protected as copyright works as such. The TRIPS Agreement and the WCT are clear that compilations of non-copyright materials can be protected as compilations and databases. In addition, in some jurisdictions, there is special *sui generis* protection for databases. See also under “Registers and databases” below.

46. For all these works protected as copyright ((a) to (c), above):

- (a) The copyright owners would have economic rights enabling them to authorize or prevent the range of acts associated with copyright protection, including reproduction, adaptation, public performance, distribution and communication to the public.
- (b) They would also enjoy moral rights to attribution, integrity (the right to object to distortion of the work) and publication (the right to decide when, where and in what form the work will be published or disclosed). Moral rights are considered by many to be particularly useful for TCEs.
- (c) Economic rights would last for at least 50 years following the death of the author or last surviving author in cases of joint authorship. The precise duration of protection will depend on national law. Moral rights, on the other hand, might last indefinitely, again depending on national law.
- (d) “Fixation” is not a requirement for protection under international copyright law (therefore, “unfixed” paintings and other visual art such as body-painting and sand

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<sup>26</sup> It may be recalled that copyright is an automatic right and is not dependent upon any formalities.

carvings are in principle protectable under international principles). The “fixation” obstacle is only relevant in those (primarily common law) countries which have chosen to require fixation as a requirement at the national level. In addition, most TCEs which are vulnerable to exploitation are in fixed form (such as visual art, crafts), an exception perhaps being live performances of TCEs (for which see below under “Performances of TCEs”).

- (e) Copyright protection is available for works made by more than one author, provided the authors are identifiable or in cases where a legal entity is the copyright owner of works.
- (f) There are no formalities attached to copyright protection.
- (g) The protection is internationally enforceable through the Berne Convention, 1971 and the TRIPS Agreement, 1994. As a result, TCEs protectable as copyright works are protected in foreign countries parties to these instruments on the basis of “national treatment.”

47. It should be noted that in many jurisdictions recordings of TCEs such as music are protected under “related rights” law. With respect to such works:

- (a) The protection granted to sound recordings of traditional music (and other TCEs such as legends and proverbs) derives from the Rome Convention, 1961, the TRIPS Agreement, 1994 and the WPPT, 1996 addressing “related rights”. The protection vesting in a sound recording provides an indirect protection for the TCEs, and also promotes the preservation and promotion of the TCEs. TCEs which were once only transmitted by oral tradition, and therefore unprotected under those national laws that require fixation as a copyright requirement, may be indirectly protected through their fixation in a sound recording. The related rights owners of rights in sound recordings are in effect the producers of the sound recordings, and they enjoy the exclusive rights of reproduction, distribution, rental and making available. They may also enjoy, under Article 12 of the Rome Convention and Article 15 of the WPPT, 1996, an optional right of remuneration in the case of sound recordings published for commercial purposes for broadcasting or communication to the public. This equitable remuneration would be shared with the performers whose performances are recorded (see further below under “Performances of TCEs”). According to an Agreed Statement concerning Article 15 of the WPPT, 1996, producers of sound recordings of TCEs not published for commercial gain may also, under national implementing laws, be granted such a right (as may the performers of the TCEs embodied in the recording, see further below). This Agreed Statement was adopted specifically to take into account that TCEs are often exploited on a large scale by broadcasting and other forms of communication to the public on the basis of non-commercial recordings (such as ethnographic recordings).

#### *Performances of TCEs*

48. Although there was a view that even performers of TCEs were protected under the Rome Convention, 1961, any doubt was removed by the WPPT, 1996, and the Beijing Treaty, 2012 (not yet in force), which now clearly protect the rights of performers of “expressions of folklore”.

49. The protection provided by the WPPT, 1996 encompasses moral rights, various exclusive economic rights and the optional right of equitable remuneration in cases where the

performance is recorded in a sound recording that is published for commercial purposes, as referred to above. The Agreed Statement concerning Article 15 of the WPPT, 1996 also applies to performers. Performers' rights are time limited to at least 50 years from the time that the performance was fixed in a sound recording. If the performance is not fixed (such as a live performance), term is not relevant because protection can only be in respect of simultaneous acts.<sup>27</sup>

50. When it enters into force, the Beijing Treaty will provide protection to performers, whose performances have been fixed in audiovisual media, such as film and television, as well as musicians with respect to their performances directly fixed or recorded in an audiovisual fixation. Similarly to the WPPT, 1996, the Beijing Treaty, 2012 will provide rights in audiovisual performances of "literary and artistic works or expressions of folklore". The protection provided will encompass moral rights and a series of economic rights, including economic rights in their unfixed performances, the rights of reproduction, distribution and rental, the right of making available of fixed performances, and the right of broadcasting and communication to the public.<sup>28</sup> Performers' rights in audiovisual fixations are time limited to at least 50 years from the time that the performance was fixed.<sup>29</sup>

51. It might be said that performances of TCEs are extensively protected under international related rights laws or at least on par with other performances. Articles 5 to 10 of the WPPT, 1996 establish a series of moral and economic rights for performers as far as the aural part of their performances are concerned. Articles 5 to 11 of the Beijing Treaty, 2012 establish a series of moral and economic rights for performers, whose works are fixed in an audiovisual media. The actual extent of this protection at the national level depends on the extent to which and how countries have ratified and implemented those treaties. It may be noted that the Beijing Treaty, 2012 is not yet in force,<sup>30</sup> and that not all States have ratified the WPPT, 1996.<sup>31</sup>

### *Designs*

52. Much of the analysis above with respect to literary and artistic productions is relevant also to designs. Traditional designs that are more contemporary adaptations of earlier traditional designs would qualify for protection as industrial designs and could be registered as such, and other documents cited examples from China and Kazakhstan.<sup>32</sup> On the other hand, underlying designs from the distant past and copies of them would not be protected. There is, however, less experience with the protection of traditional designs.

53. A proposal concerning the possibility to require, as an element of an application, a disclosure of the origin or source of TCEs, TK or biological/genetic resources utilized or incorporated in an industrial design has been put forward by some Member States in the context of the draft Design Law Treaty.<sup>33</sup>

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<sup>27</sup> Articles 5 and 6, WPPT, 1996.

<sup>28</sup> Articles 5 to 11, Beijing Treaty, 2012.

<sup>29</sup> Article 14, Beijing Treaty, 2012.

<sup>30</sup> The Beijing Treaty will enter into force three months after 30 eligible parties have deposited their instruments of ratification or accession. As at June 25, 2018, 20 States have done so.

<sup>31</sup> As at June 25, 2018, 96 have done so.

<sup>32</sup> WIPO/GRTKF/IC/5/3 and WIPO, Consolidated Analysis.

<sup>33</sup> SCT/35/2.

*Secret TCEs*

54. An effective form of protection for secret TCEs is not to disclose them, but case law demonstrates that under common law in at least some jurisdictions information conveyed in confidence is protected against further disclosure. In the Australian case *Foster vs. Mountford* (1976) 29 FLR 233 an indigenous community in Australia was able to interdict the publication of images and information about sacred sites, objects and other TCEs which were of deep religious and cultural significance to the community and which had been disclosed to an anthropologist in good faith and in confidence.<sup>34</sup> For a discussion of related policy considerations, please see under “Policy Questions” below.

55. This form of protection under common law finds resonance in the specific protection provided in international IP treaties to laws against unfair competition (Article 10*bis* of the Paris Convention, 1967 and Article 39 of the TRIPS Agreement), which includes protection against the disclosure of confidential information. A “breach of confidence”, such as the one in the *Foster vs. Mountford* case, is included as a form of a practice “contrary to honest commercial practices”<sup>35</sup> as referred to in Article 39 of the TRIPS Agreement, 1994.

56. Protection of confidential information requires neither formalities nor a contractual relationship between the community and the party receiving the information. Yet, indigenous and other communities may encounter practical obstacles in asserting rights, such as limited access to legal services and funding. See under “Operational Divide” above.

57. In addition, ethnographic researchers and others have more recently developed ethical codes and protocols which can serve to avoid cultural harms such as those in the *Mountford* case (see further under “Protocols, Codes of Conduct, Contracts and other Practical Tools” below). WIPO has established a searchable database of such codes and protocols at [http://www.wipo.int/tk/en/databases/creative\\_heritage/](http://www.wipo.int/tk/en/databases/creative_heritage/).

*Indigenous and traditional names, words and symbols*

58. There are two aspects here, namely:

- (a) *Defensive protection*: Indigenous 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, and/or domain names; and
- (b) *Positive protection*: the positive protection by communities of indigenous names, words and symbols as trademarks, certification and collective marks, and geographical indications.

59. In respect of defensive protection, Article 6 *quinquies* of the Paris Convention provides for the refusal or invalidity of the registration of marks that are “contrary to morality or public order and, in particular, of such a nature as to deceive the public”. Corresponding rules can be found in the national trademark laws of most countries.

60. The general law of unfair competition, including protection against “passing off”, is also applicable and useful in this context.

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<sup>34</sup> WIPO, Consolidated Analysis.

<sup>35</sup> For the purpose of Article 39 of the TRIPS Agreement, “a manner contrary to honest commercial practices” shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who know, or were grossly negligent in failing to know, that such practices were involved in the acquisition” note 10 to the TRIPS Agreement.

61. In respect of positive protection, international principles and procedures are available to communities who wish to register trademarks which are “distinctive”. Trademark protection is potentially indefinite. Several indigenous communities have also registered collective or certification trademarks (see further below) as well as geographical indications.<sup>36</sup>

**B. Gaps which exist at the international level, and an illustration of those gaps with examples to the extent possible**

*Literary and artistic productions*

62. The following gaps may be identified:<sup>37</sup>

- (a) *The “originality” requirement*: TCEs which are mere imitations or recreations of pre-existing TCEs are unlikely to meet the “originality” requirement and, therefore, to be protected as conventional copyright works. This means that their creators are unlikely to be vested with economic rights (it should be noted that moral rights can also apply to works in the “public domain”, including perhaps pre-existing TCEs). Further, in respect of those TCEs which are protected as conventional copyright works, the law makes no distinction based on the identity of the author, i.e., the originality requirement could be met even by an author of a contemporary expression of folklore who is not a member of the relevant community in which the tradition originated. This may trouble indigenous and traditional communities who may wish to deny or at least restrict the ability of persons not from the relevant community from enjoying copyright in creations derived from that community (see under “Defensive protection” below).
- (b) *Protection of “style”*: One of the claims most frequently heard is that the “style” of an indigenous production has been imitated or misappropriated. 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. Therefore, even if copyright were to vest in a new tradition-based cultural expression, copyright protection would not *per se* prevent the traditional “style” of the protected work from being appropriated. Elements of style may be protected to the extent that a style incorporates original expression. Further, the law of unfair competition and the common-law tort of passing off might be helpful (see below). These may relate to protection of a style *per se*, as an object of protection, or to protection against a misleading connotation or representation that is based on the use of a style or distinctive imagery or symbols. It is in fact often the reputation associated with a TCE, as embodied or represented by its distinctive “style”, that is the object of misappropriation.
- (c) *Ownership*: In cases of underlying and pre-existing TCEs, in some national systems protection may not be available under copyright for productions in respect of which there is no identifiable author or authors but rather a community or other collective which seeks protection. In other words, productions which have been collectively developed over time by unknown authors may not be protected by copyright. There is one possibility, however, and that is the

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<sup>36</sup> Generally, on the use of existing IP tools to protect and promote TK and TCEs, see WIPO, *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*, 2017

<sup>37</sup> The fixation requirement is not addressed here as a “gap” because it is not a requirement under international copyright law.

protection afforded by Article 15.4 of the Berne Convention, discussed above.<sup>38</sup> Disadvantages of this Article include that it is optional and most national laws have not enacted it, the term of protection for such works is limited to at least 50 years once the work is “lawfully made available to the public” and that the role of communities is not explicitly mentioned but rather a “competent authority” exercises the rights on behalf of the author. The protection under the Article is also limited by Article 7.3 of the Berne Convention which states that countries are not required to protect anonymous works in respect of which it is reasonable to presume that the author has been dead for 50 years.

- (d) *Term of protection:* 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, 1971 stipulates 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods. However, it is generally 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. That said, moral rights are often indefinite in many national laws, and there are several variations on the term of economic rights in national laws.
- (e) *Exceptions and limitations:* The “public domain” element of the IP system<sup>39</sup> is criticized and/or disputed by some indigenous communities as a concept not recognized by them. Furthermore, certain specific exceptions and limitations common in copyright law are criticized as inappropriate to TCEs, such as 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.<sup>40</sup> Similarly, national copyright laws often allow public archives and libraries to make reproductions of works and keep them available for the public. Indigenous communities have expressed concerns about these kinds of exceptions and limitations. The limited term of copyright and related rights protection has already been dealt with separately.
- (f) *Defensive protection:* The question here is whether and how there should be regulation of derivative works created by authors not connected with the traditions and cultural materials they adapted or were inspired by. This discussion can also be applied to traditional designs. As extensively discussed previously,<sup>41</sup> 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.” The originality requirement could be met even by an author who is not a member of the community in which the tradition originated. In this context, communities may seek a form of defensive protection to deny or at least restrict the ability of authors not from the relevant community

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<sup>38</sup> Other possibilities often discussed for addressing the ownership question are the protection afforded to anonymous works and joint and/or collective works under copyright. However, as these options are generally seen as inadequate, they are not discussed further. See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

<sup>39</sup> See Note on the Meaning of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, WIPO/GRTKF/IC/17/INF/8.

<sup>40</sup> McDonald, *l. op cit.*, p. 44.

<sup>41</sup> See especially WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

from enjoying copyright in creations derived from the cultural traditions of that community.

- (g) *Ownership of recordings and documentation*: In so far as recordings and documentation of TCEs are concerned, including traditional performances, a disadvantage is that the protection described above vests in the producer who need not and is often not a member of the community concerned. The producer will often be an ethnomusicologist, folklorist or other collector. Indigenous peoples and local communities sometimes argue that their IP-related rights and interests, including those under customary and indigenous laws, are not always adequately taken into account when their 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. The activities of folklorists, collectors, fieldworkers, museums, archives etc., are, however, extremely important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Cultural institutions also play a valuable educational role. This question 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 making TCEs in the “public domain” vulnerable to unwanted exploitation. Professional organizations and associations, such as the International Council of Museums (ICOM), and cultural institutions have established practices and developed valuable ethical and IP-related codes of conduct, protocols and model contracts to address these issues. Many of these may be found in WIPO’s searchable database at [http://www.wipo.int/tk/en/databases/creative\\_heritage/](http://www.wipo.int/tk/en/databases/creative_heritage/) (see below under “Protocols, codes of conduct, contracts and other practical tools”).<sup>42</sup>

63. Examples:

- (a) paintings, including rock art, made by indigenous persons have been reproduced by non-indigenous persons on carpets, printed clothing fabric, T-shirts, dresses and other garments, and greeting cards, and subsequently distributed and offered for sale by them. Traditional art has also been offered online as wall paper. Indigenous tattoos have also been reproduced and used outside of the traditional context;
- (b) traditional music has been sampled and fused digitally with ‘techno-house’ dance rhythms to produce a best-selling “world music” album protected by copyright;
- (c) to service the souvenir market, arts and crafts (such as woven baskets, small paintings and carved figures) employing generic traditional art styles have been reproduced, imitated, and mass-produced on such non-traditional items as t-shirts, tea-towels, place mats, playing cards, postcards, drink coasters and coolers, calendars and computer mouse pads;

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<sup>42</sup> Additional information on issues linked to the documentation of TCEs can also be found in the following publications, Torsen and Anderson, “Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Museums, Libraries and Archives”, WIPO, 2010; and WIPO, “Documenting Traditional Knowledge – A Toolkit”, WIPO, 2017.

- (d) a sculpture incorporates a sacred traditional symbol. The sculptor claims copyright in the sculpture but the community alleges that he used their symbol without consent;
- (e) ethnographic recordings containing sensitive material depicting initiation rites have been made available by a cultural institution for educational and commercial purposes. The community is not the owner of the rights in the recordings and has no legal basis under IP law to object.

#### *Performances of TCEs*

64. As noted above, performances of TCEs are extensively protected under international related rights laws, namely under the WPPT, 1996 and the Beijing Treaty, 2012. However, the following could be identified as shortcomings in this form of protection:

- (a) the protection is for the benefit of the performer(s) of the TCE, and not the relevant community, especially in cases where the performer is not a member of that community. Where the performer(s) is from the same community then it is more likely that the community will benefit directly from this protection;
- (b) as the Beijing Treaty, 2012 is not yet in force, only certain aural performances are currently protected under the WPPT, 1996. This applies to all performances, not merely performances of TCEs. ;
- (c) again, as the Beijing Treaty, 2012 is not yet in force, performers' rights are limited in the audiovisual sector (again, generally, not merely in respect of TCEs). Under Article 19 of the Rome Convention, 1961, once a performer has consented to the inclusion of his performance in a visual or audiovisual fixation, the rights in Article 7 of the Convention "shall have no further application". This means that aside from the fixation right, performers' rights are limited in the audiovisual sector;
- (d) performers' rights are time limited to, at least, 50 years in cases where the performance is fixed in a sound recording or 20 years under the Rome Convention. Term is not relevant to unfixed performances. The question of term of protection may, therefore, not be considered a "gap" as such.

65. Examples: Video recordings of live performances of songs and dances by indigenous persons have been made and they have been subsequently reproduced and published on DVDs and posted on the Internet.

#### *Designs*

66. As with literary and artistic productions, truly old designs are not protected as they are not "new" or "original". Furthermore, the term of protection for designs is shorter than for copyright works. Designs protection depends also upon the compliance with certain formalities.

67. Examples: Designs embodied in hand-woven or hand-made textiles, carpets, weavings and garments have been copied and commercialized by non-indigenous persons.

#### *Secret TCEs*

68. While as noted Article 39 of the TRIPS Agreement and Article 10*bis* of the Paris Convention could in some instances provide adequate protection for secret TCEs, these

provisions are perhaps mainly applicable to industrial and commercial information. However, not all secret TCEs constitute commercially valuable information. The disclosure of TCEs, as the *Mountford* case referred to above shows, often causes cultural and spiritual rather than economic harm. This might therefore be considered a gap in the protection provided to undisclosed and confidential information.

69. Furthermore, it is not certain that all secret TCEs would be regarded as “confidential” for this purpose. Many TCEs have been disclosed within the community, which might include many people living in vast areas and in more than one environment, such as rural and urban environments. In other words, it may sometimes not be clear in which circles the secret TCEs could be revealed without losing their confidential status.

70. Example: Confidential information disclosed to an anthropologist has been published by the anthropologist (see *Mountford* case, above). In certain cases, museums, archives and other such institutions have inadvertently disclosed confidential information.

#### *Indigenous and traditional names, words and symbols*

71. In the context of defensive protection, and as already noted, there is in international trademark law the possibility to refuse registration, or declare invalid the registration, of marks that are “contrary to morality or public order and, in particular, of such a nature as to deceive the public”.

72. Although this protection seems generally adequate, a “gap” may exist in that “contrary to morality” and “contrary to public order” are broad concepts that are implemented under national laws, regulations and case law, which establish the applicable standards of public morality or public deception in a particular country. These standards, as applied to trademark applications, differ significantly across national laws, as does the concept of the public against which deception or offensiveness is measured. Interpreting these concepts requires discretionary value judgments to be made by trademark office staff and judicial officers, many of whom may not have any particular experience with indigenous communities and TCEs. In addition, trademark law will not prevent the use of indigenous and traditional names, words and symbols that are “contrary to morality”, “contrary to public order”, or “of such a nature as to deceive the public”, where the user does not seek to register a trademark, and neither will it prevent the use or registration of indigenous and traditional names, words and symbols that are not considered “contrary to morality”, “contrary to public order”, or “of such a nature as to deceive the public” (although other grounds of refusal may apply).

73. In the context of positive protection, although international principles and procedures are available to communities who wish to register trademarks which are distinctive, the trademark system does not offer a comprehensive system of protection as it would be prohibitively expensive to register all indigenous and traditional names, words and symbols associated with a community. In addition, trademark law may require that signs be used in the course of trade in order to be valid, which may be problematic for sacred and secret TCEs.

74. For these reasons, some countries and regional organizations have enacted special measures to protect against the use of TCEs as trademarks. See under “Options which exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level”, below.

75. Example: The commercial use of indigenous words, names and symbols by

non-indigenous entities in respect of corporate logos, sports gear, fashion, sports teams, games and toys, motor cars, weapons, and alcoholic products.

*C. Considerations relevant to determining whether those gaps need to be addressed*

76. Decisions as to whether or not to address any of the gaps identified above are for participants in the Committee to make. This section sets out some of the considerations and factors that participants may wish to take into account in making such decisions.

*Whether to address gaps at the international, regional, national and/or local levels*

77. One consideration could be the level at which a gap could be or may need to be addressed. Certain gaps may require addressing at the international level, by way of an international instrument of some kind,<sup>43</sup> for example, while others could be addressed at the regional, national and/or local levels. This document does not address the range of options available in terms of the kinds of instruments that States may wish to adopt, which are fully discussed in document WIPO/GRTKF/IC/12/6.

*Legislative, practice, capacity-building*

78. Gaps could be addressed through legislative action (such as the enactment of new legal standards or the improvement of existing standards, whether at the international, regional or national levels), the development of practical tools (such as the provision of model compensation/benefit-sharing contracts or research protocols or the setting up of licensing schemes) and/or through capacity-building (such as strengthening the ability of communities to negotiate with third parties on a more equal footing).

*The legal and policy environment*

79. A consideration could be the degree to which the protection of TCE subject matter is under discussion in other fora or to which extent TCEs are already the object of protection under legal instruments in other policy areas. For example, two UNESCO Conventions address TCE subject matter, the Convention for the Safeguarding of Intangible Cultural Heritage, 2003 and the Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005, discussed in previous documents. The protection of TCEs is also under discussion in certain human rights and indigenous issues forums, and the United Nations Declaration on the Rights of Indigenous Peoples<sup>44</sup> offers language on the protection of TCEs. ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries is relevant. A factor could be how best these various policy processes can complement and support each other.

80. The policy environment within WIPO is also directly relevant. One of the elements of the WIPO Development Agenda is, for example: "To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments."

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<sup>43</sup> See WIPO/GRTKF/IC/12/6 for a range of options an international instrument could take.

<sup>44</sup> Made available to the Committee as document WIPO/GRTKF/IC/12/INF/6.

*Policy questions*

81. Committee participants may also wish to consider why the gaps identified arise in the first place and the policy implications of addressing them.

82. The possible protection of TCEs raises a number of complex cultural, economic, social and trade-related questions. Previous documents have discussed policy questions at some length.<sup>45</sup>

83. In relation to IP policy, the protection or otherwise of TCEs could be assessed in relation to the effects such protection would have on the promotion and protection of creativity and innovation as contributions to sustainable economic development, including local and rural community development. Calls for the indefinite protection of TCEs or for the protection of “style”, for example, are usefully assessed in relation to the core policy tenets of the relevant IP systems. Furthermore, 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” and the implications for the “public domain” of protecting TCEs.<sup>46</sup> A key policy challenge is coordinating any new protection for TCEs with existing IP and other systems.

84. However, the protection of TCEs also touches upon other important policy areas. Participants in the Committee may wish to consider the protection of TCEs in relation to, for example: the safeguarding and preservation of cultural heritage; freedom of expression; respect for the rights, interests and claims of indigenous and other traditional communities; recognition of customary laws, protocols and practices; access to knowledge and the scope of the “public domain”; addressing the challenges of multiculturalism; and, promotion of cultural diversity, including linguistic diversity, and of access to a diversity of cultural expressions.

*Economic, cultural and social objectives*

85. Identifying policy responses to these issues recalls the need to be clear on the broader economic, cultural and social objectives intended to be served by the protection of TCEs, as discussed above. Previous documents have identified a range of objectives sought to be achieved through TCE protection, such as:

- (a) recognizing the value of TCEs;
- (b) promoting respect for TCEs;
- (c) meeting the actual needs of communities;
- (d) preventing the misappropriation of TCEs, as well as offensive, derogatory and unauthorized uses of TCEs;
- (e) empowering communities;
- (f) supporting customary practices and community cooperation;
- (g) contributing to the safeguarding of traditional cultures;
- (h) encouraging community innovation and creativity;
- (i) promoting intellectual and artistic freedom, research and cultural exchange on equitable terms;
- (j) contributing to cultural diversity;
- (k) promoting community development and legitimate trading activities;
- (l) precluding unauthorized IP rights;

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<sup>45</sup> WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/3.

<sup>46</sup> See WIPO document WIPO/GRTKF/IC/5/3, paras. 22 to 33, and subsequent documents.

- (m) enhancing certainty, transparency and mutual confidence;
- (n) controlling ways in which TCEs are used beyond the traditional and customary context;
- (o) promoting the equitable sharing of benefits arising from the use of TCEs with free prior informed consent;
- (p) recognizing rights already acquired by third parties and providing for legal certainty and a rich and accessible public domain;
- (q) assisting in the prevention of the erroneous grant or intellectual property rights over TCEs.

*Specific technical and legal questions*

86. Committee participants may also wish to assess the addressing of gaps in relation to the specific technical and legal questions that have been previously identified as necessary to consider in relation to IP and TCEs. These are:

- (a) what are the desired objectives of IP protection for TCEs?
- (b) what TCEs should be protected?
- (c) who should benefit from any such protection or hold the rights to protectable TCEs?
- (d) what forms of behaviors or acts in relation to the protectable TCEs should be considered unacceptable or illegal?
- (e) should there be any exceptions or limitations attaching to protectable TCEs?
- (f) for how long should protection be accorded?
- (g) should there be any formalities (such as examination and registration)?
- (h) how should the rights be administered?
- (i) what sanctions or penalties should apply to behavior or acts considered to be unacceptable or illegal?
- (j) should newly recognized rights in TCEs have retrospective effect?
- (k) how should foreign right holders/beneficiaries be treated?

*Operational questions: rights management and compliance*

87. Protection should be practically feasible and enforceable, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike. It has been widely recognized that the protection of TCEs must be supported by the provision of appropriate technical assistance, capacity-strengthening and support for documentation where desired by communities.

*D. Options which exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level*

88. An option is to enact a special, stand-alone law to provide protection for TCEs that addresses the identified gaps under conventional IP law. A number of countries and regional organizations have enacted such laws. Many countries have provided special protection for TCEs within their copyright legislation, and others have provided for IP-like protection for TCE subject matter in other legislation, such as cultural heritage safeguarding and trade practices legislation. The texts of these laws are available on WIPO's website,<sup>47</sup> and many of them have been analyzed and compared in previous Committee documents.<sup>48</sup> Such laws and measures can deal comprehensively with the gaps identified and provide an entire form

<sup>47</sup> <http://www.wipo.int/tk/en/databases/tklaws>.

<sup>48</sup> WIPO/GRTKF/IC5/INF 3, WIPO/GRTKF/IC/5/3 and WIPO, Consolidated Analysis.

of protection directly tailored for TCEs. They may provide, for example, for communal rights which are protected indefinitely. Whether to enact such a law is a political and policy decision for Member States, taking into account policy, operational and technical considerations such as those suggested above.

89. The focus of this section is particularly on specific adjustments and improvements to relevant existing IP laws as well as non-legal options addressing the specific gaps identified. These adjustments and improvements would be *sui generis* in the sense that they would respond to the particular needs of TCE bearers and be tailored to the particular qualities of TCEs. The options are not necessarily mutually-exclusive.

#### *Literary and artistic productions*

##### Recognition of communal rights and interests

90. Courts have been prepared to recognize communal interests in a copyright work. In the Australian case of *Bulun Bulun v. R & T Textiles (Pty) Ltd (1998) 41 IPR 513*<sup>49</sup>, the court held that, where an individual indigenous artist is given permission by an indigenous community for the creation of an artistic work in accordance with the requirements of customary law and custom, the artist may owe fiduciary obligations to act to preserve the integrity of communal culture. Such fiduciary obligations may arise out of the relationship between the artist and the community as one of mutual trust and confidence. Customary law is part of the factual matrix which characterizes the relationship. Arising out of the fiduciary relationship, the community's primary right was to bring an action against the artist to enforce his fiduciary obligations in the event of a breach of his obligations.

##### Communal moral rights

91. Moral rights (the rights to claim authorship and to object to derogatory treatment) may respond to many needs in relation to TCEs and are potentially indefinite in duration (see above). However, they are, like economic rights under copyright, linked to an identifiable author or authors. Communal moral rights could be an avenue to explore further. In 2003, the former Australian Government circulated an exposure draft of an Indigenous Communal Moral Rights (ICMR) Bill to protect the cultural interests of indigenous communities.<sup>50</sup> ICMR was considered to be a possible tool for indigenous peoples to prevent derogatory treatment of works drawing on their traditions, customs and beliefs. Aspects of the proposed draft Bill were criticized by indigenous people and other interests. The Bill, however, did not proceed to law.

92. It is worth recalling that moral rights protection can and often lasts indefinitely in many national laws. In effect, moral rights continue to apply in respect of works that have since passed into the public domain, which could include pre-existing TCEs.

##### Clarification of scope of Article 15.4 of the Berne Convention

93. Article 15.4 of the Berne Convention has been of very limited use in practice. It might be worth exploring the reasons therefore. It has been suggested in discussions within the

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<sup>49</sup> See Janke, Terri, 'Minding Culture – The Protection of Traditional Cultural Expressions', commissioned by WIPO.

<sup>50</sup> Intervention of Delegation of Australia (WIPO/GRTKF/IC/5/15, para. 131).

Committee that an option might be to re-examine Article 15.4 of the Berne Convention and to explore options for its improvement.<sup>51</sup>

94. These options could include clarifying that (i) the protection under the article extends also to “published” works, (ii) the term of protection applicable to Article 15.4 works is a minimum and States are free to apply a longer term if they wish, provided the term is a limited one, and (iii) the “competent authority” referred to could include an authority established under national law by a community or some other authority in which such communities have a strong say.

95. 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. Moral rights are indefinite in many national laws. Royalty rights from use of the famous work ‘Peter Pan’ subsist in perpetuity under United Kingdom copyright law for the benefit of a charitable cause. Certain Member States of the European Union have granted longer periods of protection to offset the effects of the World Wars on the exploitation of authors’ works, and there are special provisions for the protection of previously unpublished works.<sup>52</sup>

96. No time limit is set in the Model Provisions, the Panama Law and the Pacific Regional Framework. It has been suggested that protection might be limited to a ‘forward-looking’ term of protection and that TCEs could be protected for the next 150 years, for example.<sup>53</sup> It has also been suggested that the maximum term of protection could be linked to the lifespan of the 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.<sup>54</sup>

#### Domaine public payant

97. Several countries have introduced this system according to which works in the public domain entail a payment, often to a national cultural fund or the like. This approach provides remuneration from the use of TCEs (to the extent they are considered “public domain”) but does not prevent outsiders from using the TCEs. It can therefore be described as a “use now, pay later” scheme. Some criticize such an approach as establishing an eternal copyright which would exclude works from the creative cycle. A broadly similar approach has also been referred to as a “compensatory liability regime”.

#### Orphan works

98. “Orphan” works refer to copyright works of which the author is unknown or unlocatable. TCEs are generally seen as productions which never had an author in the copyright sense” and are, therefore, not “orphaned” as such. Further, indigenous communities might be sensitive to suggestions that their TCEs are “orphans” simply because they are social and collective; it may also be argued that they do have an identifiable authorship albeit collective. However, in the context of TCEs, where there is often no single fixed expression by a single identifiable author, it could be argued that a given TCE resembles an “orphaned” work and that, therefore, laws or current proposals which address unlocatable authors may provide ideas or options for the protection of TCEs.

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<sup>51</sup> Interventions by Delegations of Italy and Brazil at the 12<sup>th</sup> session of the IGC.

<sup>52</sup> EU Directive 93/98/EEC, Preamble 6 and Article 4.

<sup>53</sup> See WIPO/GRTKF/IC/5/15, par. 37.

<sup>54</sup> Scafidi, S., ‘Intellectual Property and Cultural Products,’ 81 *B.U.L. Rev.* 793.

99. A number of jurisdictions are considering or have already adopted legislation. Canada, for example, has implemented legislation that creates a compulsory licensing scheme allowing for the use of published works to be issued by the national copyright authority on behalf of unlocatable copyright owners.<sup>55</sup> In 2012, the European Union adopted the Orphan Works Directive<sup>56</sup> to set common rules for its members on the digitization and online display of orphan works. In the United States of America, the Copyright Office reviewed the question of orphan works and released its analysis in June 2015 recommending a limited liability model.<sup>57</sup>

### Resale right

100. Resale rights (*le droit de suite*) are provided for optionally in the Berne Convention (Article 14*ter*) and are recognized in some but not all jurisdictions. These inalienable rights allow an artist (or his or her heirs) to receive a percentage of the selling price of a work of art when it is resold by an art-market professional (auctioneers, galleries or other art dealers); the goal is to allow artists to reap a financial benefit as their creative works increase in value. The European Union issued a directive on the issue in 2001 to harmonize its members' approach to resale rights.<sup>58</sup> It requires each EU State to enact legislation giving artists a right to a percentage, on a sliding scale, of the profit up to a certain cap made on the resale of their works for a period of their lifetime plus seventy years. Several Latin American and African countries also employ a resale right. The resale right could also be used as a benefit-sharing mechanism to funnel proceeds from the sale by auction houses of indigenous art to indigenous artists to the extent that they are regarded as "authors" and their TCEs are works protected by copyright, which could often be the case.<sup>59</sup>

### Use of distinctive signs and unfair competition principles to combat misappropriation of reputation associated with TCEs ("style")

101. Options in this regard include:

- (a) *Laws of unfair competition and the common law tort of passing off:* It is often the reputation associated with a TCE, as embodied or represented by its distinctive "style", that is the object of misappropriation. Protection in this context would include protection against false claims as to "authenticity" or community association or endorsement. The law of unfair competition and the common-law tort of passing off might be helpful. These may relate to protection of a style *per se* as an object of protection, or to protection against a misleading representation that is based on the use of a style or distinctive imagery or symbols. This discussion can also be applied to traditional designs.
- (b) *Certification marks:* Indigenous communities in several countries have registered certification and/or collective trademarks or "authenticity labels", such as

<sup>55</sup> Copyright Act of Canada, Art. 77, available at <http://laws-lois.justice.gc.ca/eng/acts/c-42/page-32.html#h-88>

<sup>56</sup> Directive on certain permitted uses of orphan works, 2012.

[http://ec.europa.eu/internal\\_market/copyright/orphan\\_works/index\\_en.htm#maincontentSec1](http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm#maincontentSec1).

<sup>57</sup> <https://www.copyright.gov/orphan/>.

<sup>58</sup> Directive on Resale Rights for the Benefit of the Authors of Original Works of Art, 2001.

<sup>59</sup> On the resale right see Farchy, J. and Graddy, K, The Economic Implications of the Artist's Resale Right SCCR/35/7.

Australia, New Zealand, Canada, the United States of America (Alaska), Japan,<sup>60</sup>  
Panama, Fiji.<sup>61</sup>

- (c) *'Truth in advertising' and labeling laws:* The Indian Arts and Crafts Act, 1990 (the IACA) of the United States of America 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.<sup>62</sup>
- (d) *Geographical indications:* 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.<sup>63</sup>
- (e) *Unfair competition or trade practices law:* The general principles of unfair competition law, as embodied in Article 10*bis* of the Paris Convention and incorporated into the TRIPS Agreement, have been recognized in the Committee's discussion as useful. In addition, under specific trade practices legislation, 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.<sup>64</sup>

### Derivative works and the defensive protection of literary and artistic productions

102. This raises a number of fundamental policy issues which have been discussed at length in previous documents.<sup>65</sup>

103. 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. An adaptation right applies to the making of derivative works based on 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 TCEs. If there is no such adaptation right, the community cannot control this use of its cultural materials and traditions under an IP-like

<sup>60</sup> One Village One Product Initiative in Oita, Japan uses a certification system. The OVOP Initiative has since been introduced also in Thailand, Indonesia, Laos and Cambodia.

<sup>61</sup> See Consolidated Analysis.

<sup>62</sup> WIPO/GRTKF/IC/3/10, par. 122 (i).

<sup>63</sup> See WIPO/GRTKF/IC/5/3.

<sup>64</sup> See further WIPO/GRTKF/IC/5/3.

<sup>65</sup> See especially WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

system. Whether to grant an adaptation right is also closely related to what precisely is meant by a “traditional cultural expression”.

104. It should be noted that denying copyright to authors of such derivative works who are not community members might discourage creativity and establish inequities between authors from within communities and those not. An option could be to oblige external authors to acknowledge the community whose traditions were used as a source of inspiration, to share benefits from exploitation of the copyright, and/or to respect some form of moral rights in the underlying traditions used.

#### Protocols, codes of conduct, contracts and other practical tools

105. Practical tools such as protocols, codes of conduct and contracts can play a useful and practical role in addressing gaps in the protection provided to TCEs. A number of indigenous communities have, for example, developed their own IP-related protocols and licenses for dealing with external requests for access to and use of their TCEs, and a number of cultural institutions and professional associations have also developed ethical and IP-related codes of conduct and model contracts. Practical tools such as these can play a very valuable role in supplementing and/or clarifying the protection available under statutory and common law in ways that respond to the needs and aspirations of communities, including through recognition of elements of their customary laws. In order for such practical tools to be truly effective in practice, however, they must be accompanied by capacity-building aimed at strengthening the ability of communities to negotiate, draft, conclude and enforce protocols and contracts.

106. WIPO’s Creative Heritage Project<sup>66</sup> is a response to this very need in relation to the management of IP when TCEs are recorded, documented and digitized. This capacity-building Project provides IP-related training, information and advice to both communities and museums, archives and other cultural institutions. A resource book for museums and other institutions entitled *Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Museums, Libraries and Archives* was published by WIPO in 2010.<sup>67</sup> The Project also provides training to communities in cultural documentation, archiving and IP management. A pilot of this training program, for the Maasai community of Laikipia, Kenya took place in September 2008.<sup>68</sup> In 2011, the program was run with the Maroon and Rastafari communities in Jamaica, taking into account lessons learned from the Maasai experience. The training has been offered by WIPO in collaboration with the American Folklife Center (AFC) at the Library of Congress in Washington D.C. and the Center for Documentary Studies (CDS) at Duke University in North Carolina. The Project has established a public, searchable database of protocols, codes of conduct and model contracts used by communities, museums and other institutions, professional associations and others, available at [http://www.wipo.int/tk/en/databases/creative\\_heritage/](http://www.wipo.int/tk/en/databases/creative_heritage/). Other resources include surveys of experiences of museums and archives with managing IP issues.<sup>69</sup>

#### Registers and databases

107. Registers, inventories, databases and lists of TCEs could play a role in their legal protection. However, the recording and digitization of TCEs, even though it may be valuable

<sup>66</sup> See <http://www.wipo.int/tk/en/resources/training.html>.

<sup>67</sup> [http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo\\_pub\\_1023.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf).

<sup>68</sup> See Wendland, “Managing Rights in Digitized Indigenous Music”, WIPO Magazine, October 2016 [http://www.wipo.int/wipo\\_magazine/en/2016/05/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2016/05/article_0003.html).

<sup>69</sup> <http://www.wipo.int/tk/en/resources/surveys.html>.

for cultural heritage safeguarding and promotion programs, can unwittingly make the TCEs vulnerable to unauthorized use and exploitation. Strategic management of IP during TCEs recording, digitization and dissemination is therefore advisable (see on Creative Heritage Project above).

108. Registers, inventories, databases and lists can serve *inter alia* to: (i) preserve and maintain TCEs; (ii) act as a resource for creators and entrepreneurs; (iii) identify communities which might be entitled to benefit-sharing and rights in TCEs; (iv) provide the means by which positive rights over TCEs may be acquired or recorded; and, (v) serve as the mechanism for obtaining TCE protection through *sui generis* database protection. Registers can be non-exhaustive in the sense that they do not necessarily reflect all TCEs for which protection is sought. Some form of documentation of TCEs can also serve as a confidential or secret record of TCEs reserved for the community only.

#### Collective management

109. With regard to challenges associated with the management of rights, existing collective management organizations (CMOs) are potentially a practical means of administering rights in TCEs. Committee participants<sup>70</sup> and CMOs themselves<sup>71</sup> have expressed interest in exploring this possibility further, while others are concerned at the establishment of administrative bodies that would impede the normal use of TCEs by authors, artists and publishers.

#### *Performances of TCEs*

110. Performances of TCEs are already protected on par with the protection provided to other performances. For example, Articles 5 to 10 of the WPPT, 1996 and Articles 5 to 11 of the Beijing Treaty, 2012 (treaty not yet in force), establish a series of moral and economic rights for performers. Practical tools such as protocols, codes of conduct and contracts can also play an immediately useful and practical role in this area.

#### *Designs*

111. See above under Literary and Artistic Productions, especially under “Use of unfair competition principles to combat misappropriation of reputation associated with TCEs, including “style” and “Derivative works and the defensive protection of literary and artistic productions”. Further, practical tools such as protocols, codes of conduct and contracts can play an immediately useful and practical role in addressing gaps in the protection provided to TCEs.

#### *Secret TCEs*

112. The following may be options for addressing the gaps identified above:

- (a) *Promissory estoppel*: The doctrine of promissory estoppel prevents one party from withdrawing a promise made to a second party if the latter has reasonably relied on that promise and acted upon it to his detriment. For example, a community which has relied on the verbal commitments of a researcher not to disclose any secret information revealed to him or her would be able to use this doctrine to prevent the researcher from disclosing the information. This could be

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<sup>70</sup> GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5).

<sup>71</sup> Such as the International Federation of Reprographic Rights Organizations (IFRRO).

another basis on which to address cases such as *Mountford*. Use of such a doctrine could also protect information that is not necessarily commercially valuable.

- (b) *Protocols, contracts, consent forms*: See discussion above. These practical tools could also be very useful in regulating access to secret TCEs.
- (c) *Registers and databases*: See discussion above. Confidential registers and databases could serve to preserve the TCEs and, coupled with appropriate contracts and consent forms, be used to control access to and use of the TCEs on terms set by the community.

#### *Indigenous and traditional names, words and symbols*

113. In respect of defensive protection, certain regional organizations and States have already taken steps to prevent the unauthorized registration of indigenous marks as trademarks. These are national measures or measures applicable within an regional organization, and they could be adopted more widely. These are reported on in detail in previous documents and include, for example:

- (a) 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 culture or practice, except where the application is filed by the community itself or with its express consent;”
- (b) 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.<sup>72</sup> The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe;<sup>73</sup> and
- (c) 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.<sup>74</sup>

[Annex II follows]

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<sup>72</sup> See “Report on the Official Insignia of Native American Tribes,” September 30, 1999.

<sup>73</sup> *Ibid.*, pp. 24-26.

<sup>74</sup> The Act is available at <http://www.legislation.govt.nz/act/public/2002/0049/54.0/DLM164240.html>.

Protection desired for	A. Existing Protection	B. Gaps	D. Options
Literary and Artistic Productions	<ul style="list-style-type: none"> <li>• Copyright protection for contemporary expressions of traditional cultures</li> <li>• Article 15.4 of the Berne Convention – copyright protection for unpublished works of unknown authors</li> <li>• Collections, compilations and databases of TCEs</li> <li>• Recordings and documentation of TCEs</li> </ul>	<ul style="list-style-type: none"> <li>• New TCEs based on pre-existing TCEs are unlikely to meet the ‘originality’ requirement</li> <li>• Copyright law provides protection to the particular expression of a work, but not to underlying ideas, which may make protection of “styles” difficult</li> <li>• No explicit communal rights protection</li> <li>• Term of protection limited</li> <li>• The “public domain” and other exceptions and limitations</li> <li>• Derivative works, adaptations and defensive protection</li> <li>• Rights in recordings and documentation</li> </ul>	<ul style="list-style-type: none"> <li>• Recognition of communal rights</li> <li>• Communal moral rights</li> <li>• Clarification of Article 15.4, Berne</li> <li>• <i>Domaine public payante</i></li> <li>• Orphan works</li> <li>• Resale rights</li> <li>• Use of unfair competition principles to combat misappropriation of reputation associated with TCEs (“style”)</li> <li>• Derivative works and the defensive protection of literary and artistic productions</li> <li>• Protocols, codes of conduct, contracts and other practical tools</li> <li>• Special, stand-alone (sui generis) law</li> <li>• Registers and databases</li> <li>• Collective management</li> </ul>

<b>Protection desired for</b>	<b>A. Existing Protection</b>	<b>B. Gaps</b>	<b>D. Options</b>
Performances of TCEs	<ul style="list-style-type: none"> <li>• Protection provided by the WPPT, 1996</li> <li>• Protection will be provided by the Beijing Treaty, 2012 (treaty not yet in force)</li> </ul>	<ul style="list-style-type: none"> <li>• Limited term of protection for fixed performances</li> </ul>	<ul style="list-style-type: none"> <li>• Protocols, codes of conduct, contracts and other practical tools</li> <li>• Special, stand-alone law</li> </ul>
Designs	<ul style="list-style-type: none"> <li>• Industrial designs protection for contemporary designs</li> <li>• Collections, compilations and databases of traditional designs</li> </ul>	<ul style="list-style-type: none"> <li>• Pre-existing designs are not protected</li> <li>• Term of protection for designs limited</li> <li>• Formalities</li> </ul>	<ul style="list-style-type: none"> <li>• Use of unfair competition principles to combat misappropriation of reputation associated with TCEs (“style”)</li> <li>• Protocols, codes of conduct, contracts and other practical tools</li> <li>• Special, stand-alone law</li> <li>• Registers and databases</li> </ul>



**C. Relevant considerations:**

- The level at which a gap could be or may need to be addressed (the international, regional, national and/or local levels)
- The choice of measures to use for addressing the gaps (legislative action, the development of practical tools, capacity-building)
- The degree to which the protection of TCE subject matter is under discussion in other international forums and to which extent TCEs are already the object of protection under legal instruments in other policy areas
- Policy implications
- Economic, cultural and social objectives
- Specific technical and legal questions
- Operational questions: rights management and compliance

[End of Annex II and of document]