

SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES

SPFII COMMENTS ON WIPO'S REVISED OBJECTIVES AND PRINCIPLES

Introduction

The following comments regarding WIPO's two documents *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles (WIPO/GRTKF/IC/9/4)* and *The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/9/5)* are submitted by the Secretariat of the Permanent Forum on Indigenous Issues. The secretariat's comments are based on an analysis of the documents and are not, in any way, intended to represent the views of the members of the United Nations Permanent Forum on Indigenous Issues.

The Secretariat of the Permanent Forum on Indigenous Issues (SPFII) was established by the General Assembly in 2002. SPFII is based at UN Headquarters in New York in the Division for Social Policy and Development of the UN Department of Economic and Social Affairs (DSPD/DESA).

SPFII's main role is to:

- prepare for the annual sessions of the Permanent Forum each May. The secretariat also provides support to the Members of the UNPFII throughout the year;
- advocate for, facilitate and promote coordination and implementation within the UN system of the recommendations that emerge from each annual session;
- promote awareness of indigenous issues within the UN system, governments, and the broad public; and
- serve as a source of information and a coordination point for advocacy efforts that relate to the Permanent Forum's mandate and the ongoing issues that arise concerning indigenous peoples.

The SPFII acknowledges the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore over the past nine sessions. SPFII also acknowledges the previous work undertaken over several decades by the WIPO secretariat on the protection of Traditional Cultural Expressions/Expressions of Folklore, its fact finding missions, extensive community consultations, surveys and analysis of existing national and regional legal mechanisms under existing intellectual property and other laws.

The revised policy objectives and principles of both documents are very comprehensive as they include policy issues, statements and debates from member states, indigenous peoples' organizations and other interested civil society organizations and parties. While it has been pointed out on numerous occasions in the past, by indigenous peoples' organizations, it needs to be stated again that having the two distinct draft objectives (Cultural Expressions/Expressions of Folklore and Traditional Knowledge) could be seen as overlooking the fact that that indigenous knowledge systems are holistic and interrelated. At the same time it is acknowledged that attempts have been made to make both areas complementary to each other.

**The Protection of Traditional Cultural Expressions(TCEs)/Expressions of Folklore(EoF):
Revised Objectives and Principles (WIPO/GRTKF/IC/9/4)**

Policy Objectives

The policy objectives for the protection of TCEs and EoF are broad statements that cover a range of issues from recognizing the value of indigenous cultural heritage, empowering communities, to promoting intellectual and artistic freedom, research and cultural exchange on equitable terms. As broad statements, they should typically form part of a preamble to law or other instruments.

General Guiding Principles

Some of the principles in this section include issues that indigenous peoples have been advocating for a number of years. It is crucial that the protection of TCEs/EoF reflect the aspirations and expectations of indigenous communities and well as their customary laws and protocols. SPFII suggests that protection measures should be consistent with relevant binding legal instruments, United Nations declarations¹ and human rights instruments.

Article 1: Subject Matter of Protection

Under the title Criteria for Protection, section iii, it is stated that “Expressions that characterize more recently established communities or identities would not be covered”. It is acknowledged that this term refers specifically to the statement “where the collective has developed only in recent times, such as with modern religious sects”². SPFII suggests this issue requires further clarification because the situation of indigenous peoples is not static and is always changing. For example, migration of indigenous communities from their homelands across borders often results in the formation of new communities. Would the TCEs and EoF of these communities not be afforded protection?

Under the title *Choice of Terms*, SPFII agrees that there should be some flexibility in regards to terminology. However, detailed decisions on terminology at the national and regional level should be undertaken in **partnership** with indigenous peoples and communities.

Article 4: Management of Rights

The role of an “Agency” acting at the request and on behalf of relevant communities is an important concept but the question remains as to how realistic it would be for an agency to act on behalf of indigenous peoples and communities. In this regard, the reservations expressed by Colombia and the Saami Council are supported by SPFII.

Article 5: Exceptions and Limitations

SPFII agrees that exceptions and limitations in regards to copyright laws in general should be established by member states however, it should also be established in consultation with indigenous peoples and communities.

Article 6: Term of Protection

Indigenous peoples’ desire for indefinite protection for some aspects of expression of their communities is extremely important and for this reason, the position of indigenous peoples is supported by SPFII in this provision.

¹ *Declaration on the Rights of Indigenous Peoples* which was adopted by the Human Rights Council 29 June 2006.

² Comments by International Publishers Association, p2

Article 7: Formalities

SPFII agrees that as a general principle, TCEs/EoF should be protected without formality, similar to copyright. The issue of registration or notification for TCEs/EoF that require stronger protection requires further development. SPFII is of the opinion that an administrative organization dealing with the range of issues expressed in the provisional Article would need to be clear about its role to avoid a cumbersome workload due to the complexity of the issues.

Article 8: Sanctions, Remedies and Exercise of Rights

SPFII agrees that civil and criminal sanctions and remedies for breaches of rights, particularly where there has been community hurt and cultural harm should be considered under this provision. Further, indigenous peoples must be consulted at all levels in regards to any development on sanctions, remedies and enforcement.

Article 9: Transitional Measures

The statement that the concept of ‘public domain’ is not recognized by indigenous peoples was addressed by Victoria Tauli-Corpuz in her paper presented to the *International Workshop on Traditional Knowledge* in Panama City in September 2005³. In considering Ms Tauli-Corpuz’s paper and the Tulalip Tribes’ statement that the failure of governments and citizens to recognize and respect customary law, it is obvious that indigenous and non-indigenous peoples have different understandings of the concept of ‘public domain’. Therefore SPFII agrees that the concept of ‘public domain’ and the options set out in this provision require further reflection.

Article 10: Relationship with Intellectual Property Protection and other Forms of Protection, Preservation and Promotion.

This provision includes a good compilation of IP laws as well as non-IP measures that could be used to protect TCEs/EoF.

The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GTRKF/IC/9/5)

Policy Objectives

As previously stated, the policy objectives are broad statements and should typically form part of a preamble to law or other instrument. There is however one issue that could be added to (vi) *Support traditional knowledge systems*; which includes the need to **support the environment** in which traditional knowledge is transmitted by and between traditional knowledge holders. SPFII is of the opinion that supporting the environment in which traditional knowledge is transmitted relates to wider issues of how traditional knowledge is carried, transmitted and maintained. For example, through language and speech, hence indigenous languages must be maintained as they play a critical role in keeping traditional knowledge alive. Also, practices that keep traditional knowledge alive must also be supported such as fishing, hunting, gathering, ceremony and a wide range of community activities. Hence, what is under threat of extinction is not traditional knowledge itself but the opportunities for young people to learn, practice and respect the knowledge production and practices of their elders.

Section ix Respect for and cooperation with relevant international agreements and processes. This section discusses international and regional instruments and processes, making references to regimes that regulate access and benefit sharing. It does not specifically mention important

³ PFII/2005/WS.TK/5

instruments such as human rights instruments and the Declaration on the Rights of Indigenous peoples. SPFII suggests that these specific instruments and declaration be mentioned under this policy objective.

General Guiding Principles

The above statement about supporting the environment in which traditional knowledge is transmitted is also relevant in sections (h) and (i).

Article 1: Protection Against Misappropriation

SPFII agrees to the addition of 3 (v) because legal measures should prevent mutilation, distortion or derogatory modification of traditional knowledge which is of moral or spiritual value to traditional knowledge holders.

Article 6: Fair and Equitable Benefit-Sharing and Recognition of Knowledge Holders

This Article raises important issues in terms of commercialization of traditional knowledge and the possible benefits covering both monetary and non-monetary benefits as well as the development of contractual arrangements for the different uses as set out in the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization*. While the discussion regarding this issue is still on-going and is still in the developmental stage, SPFII makes the suggestion that this section could include information that clarifies how these discussions are linked to the Convention on Biological Diversity's (CDB) work on protecting Traditional Knowledge and its proposed international regime on access and benefit sharing. This section could also include the distinction between the CDB's work on protecting genetic resources and WIPO's interest in the inventions derived from genetic resources (which falls under the Patents Act).

Article 7: Principle of Prior Informed Consent

The SPFII has always used the term free, prior and informed consent (FPIC) which is an integral component of indigenous peoples' rights to lands, territories and resources. Free, prior and informed consent also means that indigenous peoples should not only have the right to consent, but also the right to refuse consent. Contracts and agreements can be useful because they are flexible and enable all parties to an agreement with an opportunity to negotiate a range of terms and conditions. However, SPFII has concerns that contracts and agreements are often negotiated without any nationally consistent standards or guidelines. They can also have the potential to create a disincentive for governments to develop national laws on access and benefit sharing.

Article 9: Duration of Protection

Given the transgenerational nature of traditional knowledge, SPFII supports the view that the period for protecting traditional knowledge against misappropriation should be unlimited.

Conclusion

The SPFII acknowledges that policies and debates regarding the protection of indigenous knowledge systems is a rapidly evolving area and for this reason there is no one solution that fits the large number of diverse indigenous communities not only at the international level but also at the national and local levels. There is also the recognition that this is a complex area and the challenge is to find solutions that do not place administrative burdens on indigenous communities that are already dealing with a myriad of agencies on many levels in regards to the multiple issues affecting them.

There is a view within indigenous communities that the current intellectual property rights regime is an alien and problematic construct and therefore should not be the only solution for protecting TCEs/EoF and Traditional Knowledge. Further, the burden of proof of how indigenous peoples maintain, practice and transmit traditional knowledge should not rest with indigenous peoples. Hence, the focus on establishing registers has to be considered carefully to avoid this any unnecessary burdens being placed on indigenous peoples. Indigenous peoples need to maintain their responsibilities in regulating traditional knowledge protection and practices including defining traditional knowledge within their communities. Therefore, the development of any protection measures must consider these wider issues.