

Comments of the Tulalip Tribes on WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5
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The Tulalip Tribes of Washington will focus its comments on the Revised Objectives and Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore (WIPO/GRTKF/IC/9/4) and the The Protection of Traditional Knowledge: Revised Objectives and Principles(WIPO/GRTKF/IC/9/5).

WIPO/GRTKF/IC/9/4

ARTICLE 5: EXCEPTIONS AND LIMITATIONS

(a) Measures for the protection of TCEs/EoF should:

(i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;

(ii) extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,

(iii) not apply to utilizations of TCEs/EoF in the following cases:

- by way of illustration for teaching and learning;
- non-commercial research or private study;
- criticism or review;
- reporting news or current events;
- use in the course of legal proceedings;
- the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and
- incidental uses,

provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.

(b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.

Comments of the Tulalip Tribes:

a. Illustration for teaching and learning: Indigenous and local communities may have few objections to sharing some of their knowledge for education. A Tulalip legislator in

Washington State, for example, introduced legislation which has been adopted mandating the teaching of tribal history and culture in the public schools. The Tribes in Washington State largely see the value of sharing parts of their history and culture for wider education for intercultural understanding and sharing models for a sustainable society.

However, they do have concerns that the materials are limited to the contexts in which they are shared. The Tulalip Tribes has shared with the WGTKGR an instance where a tribal elder shared a personal story with a classroom. The elder gave permission to the teacher to tape the story, thinking that it would be used by the teacher to prepare lessons related to the story. The teacher transcribed the story and published it. The elder was highly offended, since it was her personal story over which she held custodianship, and in the traditional context could only be told by her. Although people hearing the story were allowed to carry it in their memory and draw lessons from it, Tulalip custom forbids that they repeat the story to others.

b. Non-commercial research or private study: These activities can become conduits for expanding the availability of TCEs/EoFs to an ever-expanding sphere of third-party users, and can work against cultural privacy or cultural secrecy. Non-commercial research commonly leads to publication, outside of the direct control of the original holders of the TCEs/EoFs. Without extra legal provisions, published TCEs/EoFs then enter the Western copyright system, which inexorably leads to the public domain. Widely published and distributed information can change the legal presumptions about the status of the TCEs/EoFs, whether or not it was the intent of the original knowledge holders to make this information widely and publicly available. Greater availability also makes it more difficult to traditional knowledge holders to defend any recognized rights to control or benefit from the use of their TCEs/EoFs.

This broad principle may fail on two counts related to prior informed consent. The first issue concerns the authority under which research materials are obtained (who has given the consent). Many researchers, for example, have obtained access to TCEs/EoFs through personal relationships with individual tradition holders. These individuals are embedded in a larger society that may claim collective rights of control over the knowledge. The collective governance system may allow individual tradition holders to disclose knowledge, or it may not.

The second leading issue is the determination of the circumstances of consent. Many indigenous and local communities live in primarily oral cultures. They may have had little, if any, exposure to the non-indigenous academic and publishing system. Unless publishing issues and potential third party access and use issues are addressed, consent is highly problematic. Holders of TCEs/EoFs may not be aware that published and disclosed knowledge takes on a life of its own and has a legal career towards the public domain.

The Tulalip Tribes has no objection to any indigenous or local community that makes the decision, through prior informed consent, to disclose, share, and allow its knowledge to be used for study or research. The rights acquired by researchers or students, and by third

parties that encounter their published works should be limited unless released by express consent from the tradition holders.

c. Criticism or review: The objections here are covered in the objections raised above.

d. Reporting news or current events: In many cases, this may not be a problem. But a specific case should clarify potential problems.

In 1984, a reporter from the Santa Fe New Mexican flew over a sacred ceremony of the Pueblo of Santo Domingo, took pictures, and published them in the local newspaper labeled as a pow-wow (example discussed at length in Susan Scafidi, *Who Owns Culture?* Rutgers University Press, 2005 and Daniel Wugner, *Prevention of Misappropriation of Intangible Cultural Heritage through Intellectual Property Laws*, in J. Michael Finger and Philip Schuler (eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*. World Bank, 2004).

The Santo Domingo Pueblo filed suit. Calling the sacred ceremony a "pow-wow" was highly offensive. But more damaging was that the overflight disrupted the ceremony and reduced its effectiveness, so that in the mind of the Pueblo members it damaged a spiritual ceremony required to renew their relationship with certain spiritual forces for the coming year. The publication of the photographs violated customary law related to this secret ceremony. The case was settled out of court, but the Pueblo probably would have lost any claim based on intellectual property protection. The ceremony was secret, and the Pueblo had taken pains to keep it so. But the fact that it was visible from above meant that the courts would have ruled that since there was no copyright in the ceremony, there could be no remedy since it was performed the public domain as the roof was open and unprotected. The open roof, however, is necessary for communication with the Creator and tribal spirits. To protect the ceremony, the Pueblo would have to alter custom to fit the Western IPR law and cover their ceremonial space.

e. Legal proceedings: Although TCEs/EoFs must necessarily be made available in legal proceedings, this needs to be limited. Many countries have laws that make legal proceedings part of the public record and public domain, so that in the act of defending rights indigenous and local communities may in fact be putting their TCEs/EoFs at greater risk of disclosure. States should be encouraged to ensure that any evidentiary use of TCEs/EoFs in tort disputes should be protected from public access and exempt from public domain laws.

f. Archival exceptions: Indigenous and local communities often do not have objections for archives of their TCEs/EoFs, if they are in control of access, care and follow-on uses of archived materials. The Tribes in the United States have collaborated with the Library of Congress, the Smithsonian Institution, the National Museum of the American Indian, and other institutions to archive and display many tribal TCEs/EoFs.

The archiving of some TCEs/EoFs may be objectionable. Indigenous and local communities may not be simply concerned with the commercial/non-commercial

distinction, but are also concerned over the appropriateness of archiving. Customary law, for example, may forbid the storage of some forms TCEs/EoFs, particularly those that are highly sacred, secret, or restricted to certain individuals and practice.

It may be highly offensive, for example, to film, digitize and archive certain sacred ceremonies, dances, songs, and paintings. Many Navajo, for example, make sand paintings for trade or sale. But some sand painting are highly sacred, and are destroyed after use in ceremony. Archiving examples of these may be offensive, or even dangerous, as they involve strong spiritual powers.

A national urge to preserve national patrimony has in the past been used to justify archiving many TCEs/EoFs. Tradition holders in some cases disagree that these are part of the national patrimony. As the holders of the traditions, they believe they are the ones to make the decisions about their TCEs/EoFs. Some tribal elders have expressed the view that it is better for some knowledge to not be passed on or archived if the spiritual and traditional conditions for its transfer to the next generation are not met. It is a common indigenous worldview that this knowledge is not truly lost, as it comes through revelation by the Creator. If conditions are not right, the Creator may temporarily withdraw the gifts of knowledge, but these will be given again once the conditions are right.

In summary, the archiving exception should not be used to allow archiving activities that are against the wishes of the holders of the TCEs/EoFs when these can be identified, and there should be provisions for holders of TCEs/EoFs to challenge and claim rights to materials held in archives.

g. Incidental uses: These issues have been mostly addressed in previous and following comments. It will only be added that the use of even small portions of TCEs/EoFs and their incorporation into derivative works may be offensive and violate customary laws.

General Comments: For the Tulalip Tribes, the acceptability of the proposed exemptions will largely depend on national interpretation of the terms contained in the operational paragraph that places restrictions on the exemptions:

"provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community."

"Fair practice", if equated with fair use, can allow users of TCEs/EoFs to extract the ideas contained in the productions of indigenous and local communities as opposed to their expressions. This may be difficult for courts to determine, and it is likely that the presumption in national systems will often reflect national concepts of "fair use." The idea/expression defense could possibly be used to justify significant amounts of appropriation.

On the issue of acknowledgement, it should be recognized the indigenous and local communities often seek control over their knowledge, rather than acknowledgement. The

Tulalip Tribes has made a previous intervention that emphasizes that the concept of the public domain is foreign to many indigenous and local communities. Identifying the source communities as original holders of TCEs/EoFs is difficult, but not impossible. In the realm of physical objects, the United States has adopted provisions in the Native American Graves and Repatriation Act (NAGPRA) that has provisions for Tribes to petition for custodianship of human remains and sacred objects. They are required to present evidence to demonstrate direct historical connection to the human remains and sacred objects. Substantial portions of the objects cannot be affiliated with living descendants, and these fall outside of the scope of protection. Similar provisions could be modelled for TCEs/EoFs, allowing for the development of annexures to exceptions to exceptions.

The "offensiveness" standard is silent on who determines offensiveness. Those using TCEs/EoFs often claim that they are honoring traditions and their derivative works are in the spirit of cultural traditions. Tradition holders may see the derivative uses in a different light. Under customary law, many TCEs/EoFs are restricted to particular individuals, families, clans, moieties or other locally-defined groupings. They may traditionally be expressed at particular times of the year or in very narrow circumstances.

Differences in interpretation in the United States have been dealt with through the "Canons of Construction", interpretive guidelines courts use to reach judgements. On strong principle in treaty interpretation is that treaties are to be interpreted according to how the tribes negotiating the treaties understood them at the time. In cases where this cannot be determined, the courts use an interpretation that is most favorable to the tribes.

Other commentators have voiced concerns about the need to preserve fair use, free speech, freedom of expression to create national and global reservoirs of ideas and expressions from which further creations and innovations may be derived. Indigenous and local communities have expressed great concern over the imposition of external standards of fair use regarding knowledge governed by local traditions.

Free speech is partially a red herring, as many countries have defined a number of categories of speech that are forbidden, such as hate speech, seditious or treasonous expressions, slander, panic speech, and so on. Speech and expression is regulated in most, if not all, national cultures in many ways. The general rule is that limitations are carefully considered, not made overbroad, serve express purposes and not be made arbitrarily and capriciously.

The Tulalip Tribes believes that the limitations of fair use, freedom of speech and freedom of expression TCEs/EoFs argued above meet these criteria. They are narrow because they are not available to all citizens and generally apply to minority cultures within national systems. Many nations recognize indigenous rights to self-governance, and some recognize a stronger principle of tribal sovereignty based on prior rights to self-governance.

Resolution 2006/2 of the Human Rights Council contains a number of statements that reinforce this status for all indigenous peoples. Articles 11 and 31 of the current United Nations Draft Declaration on the Rights of Indigenous Peoples are particularly significant:

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The Tulalip Tribes does not believe that those objecting to the proposed limitations on standard exceptions have made their case that: a. The TCEs/EoFs of extant indigenous and local communities naturally "belong" to national or global heritage; or b. That protecting these will cause any large-scale or irreparable harm to national or global innovation systems. Indigenous and local communities have been sharing much of their traditions with national and global cultures. They generally do resist ideas that anyone, anywhere, at any time should have free access to their most sacred and private traditions, or that these traditions belong by default to the public domain. The vast majority of knowledge existing in the world is not derived from indigenous and local communities, and would not be affected by the limitations on exceptions proposed in these comments.

These are not arbitrary and capricious limitations, in that they are based on internationally recognized rights to self-determination, cultural integrity, and right to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions".

ARTICLE 8

EXCEPTIONS AND LIMITATIONS

1. The application and implementation of protection of traditional knowledge should not adversely affect:

(i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;

(ii) the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes.

2. In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.

General arguments for WIPO/GRTKF/IC/9/4 Article 5 apply here. The Tulalip Tribes would like to further elaborate on 8(2). Reiterating previous arguments:

1. Indigenous peoples widely reject the legal concept that knowledge "already readily available to the general public" is in the public domain or can be exempted from their prior informed consent. They believe their knowledge and fundamental identity is regulated by customary law and tribal traditions. They are not only concerned about uncompensated use, or with the commercial/non-commercial use distinction. They are concerned with uses that deprive them of rights to self-identity and self-development. Indigenous peoples have repeatedly stressed that non-indigenous appropriation of knowledge can deprive them of identity and lead to moral offense and spiritual, physical harm if these uses violate their traditions.

They are also concerned that provisions protecting a public domain in "traditional knowledge readily available to the general public" goes too far in codifying a past history of injustice and non-recognition of prior rights. Indigenous peoples have not sought states to grant them these rights, but have consistently sought to have prior rights to traditional knowledge recognized by states. This approach has been formally recognized in a number of state constitutions and laws, and is the approach adopted in the current United Nations Draft Declaration on the Rights of Indigenous Peoples.

It also fails to provide scope for the repatriation of knowledge and the gradual removal of traditional knowledge from being "generally being available to the public". Some states, for example Australia and New Zealand, have created special collections within university and national libraries that isolate published works containing knowledge of special concern to their indigenous peoples. Access to these materials requires permission from the original knowledge holders.

Knowledge accessible to a general public is also dependent on their opportunities for access. Most books have a short shelf life, and rapidly go out of publication. Indigenous and local communities may also become more circumspect with those who they share their knowledge. Voluntary and policy measures can supplement these processes through the use of federal policy guidance, the increasing use of voluntary ethical codes by non-governmental organizations, professional societies, publishers, and museums related to traditional knowledge. If these processes are reinforced, the result will be that over time traditional knowledge will become less available to the general public. This will, over time, reinforce indigenous and local communities' rights to share their knowledge in a more controlled way, based on prior informed consent, and on more equitable terms.

In summary, the Tulalip Tribes believe WIPO needs to rethink its proposals for broad exemptions based on current intellectual property rights practices. A *sui generis* should be based on thorough respect for customary law and local traditions. In their right to self-determination, indigenous and local communities do not generally believe they are exempt from all national and international laws. Self-determination, for example, would not be supposed to give tribes the right to reproduce and market computer software protected under national intellectual property law and international treaty. But the Tulalip Tribes believe that existing national and international law demands reciprocity when addressing state obligations to respect traditional law related to indigenous traditional knowledge.