

# INTERNATIONAL PUBLISHERS ASSOCIATION

*The following comments were received through a communication from the International Publishers Association (IPA)*

## 1. Publishers and traditional knowledge

Publishers come into contact with traditional knowledge (if spelled with lowercase we hereby mean traditional knowledge in the broader sense) and, indeed, form part of the fabric that sustains it, in many different ways:

- Local children's book publishers and school book publishers make reference in their work to the cultural context and environment of their readers. The retelling of folk tales or the depiction of the culture forming part of their readers' daily lives is part of the editorial content.
- Similarly, many writers of fiction are inspired by their local customs, traditions and the social environment in which they were raised. References may be made in the work to some specific experiences important to their local culture.
- Academic publishers publish works of scientists describing ethnological observations; others may publish medical research which is based on discoveries by indigenous peoples. In this area, there is a heightened awareness of the ethical implications of this kind of research and a series of codes of conduct have been established or are being debated.

Publishers are not mere exploiters but can be active custodians for cultures. Publishers preserve customs, traditions and traditional knowledge for local communities and help pass them on to future generations. Any international framework for the protection of TCEs/EoF/TK should therefore ensure that the positive impact of publishers' activities on the culture which they operate is not threatened by the impact of the future international framework.

## 2. IPA's support for general policy objectives

IPA highly appreciates WIPO's efforts to promote the respect for traditional knowledge by way of an international instrument. IPA believes that the formal identification and acknowledgement of TCEs/EoF and TK at an international level in itself strengthens respect for them.

IPA fully supports the general policy objectives set out in the Consultation Documents. IPA welcomes WIPO's desire to set up a protection system "inspired by the protection provided for intellectual creations" (see Consultation Documents, Policy Objectives (iv)). The intellectual property rights system is a balanced system with clearly defined rights, the ambit and depth of which lead to legal certainty.

Any transposition of one technical system to a new set of issues requires a very careful analysis of similarities and differences, so that the transposition does not yield unwanted results.

The following points highlight areas where particular care should be taken to ensure that all important characteristics in particular of intellectual property (IP) law are fully taken into account. The following comments therefore seek to compare IP principles with the principles proposed in the Consultation Documents.

### 3. Clearer and more concise definitions

IP relies on clear definitions of the kinds of works and the characteristics needed to benefit from IP protection. The framework of the Consultation Documents relies on a series of terms whose impact cannot be determined without further clarification of their exact meaning. Without such clarifications, the effect of the wording of such a Convention on the day-to-day activities of publishers remains unpredictable, a situation the likelihood of which has been successfully minimized in IP.

In particular, uncertainty surrounding the existence and scope of rights will discourage creators, including publishers, from incorporating potentially protected works in their creative efforts and making them available to the public. One aim of the envisaged protection system – the preservation and further development of TCEs/EoF and TK – may hence be precluded by unclear or very wide definitions.

The notion of “community” as used e.g. in WIPO/GRTKF/7/3, B.1 or in WIPO/GRTKF/7/5, B.3.2, must also be defined narrowly. Wording must be found that permits the free exchange between cultures whilst protecting the small core of particularly sensitive elements of traditional knowledge in the broader sense.

The Consultation Documents give some guidance as to what falls under a certain definition in the form of a “positive list” (see e.g. WIPO/GRTKF/7/3, B.5; WIPO/GRTKF/7/5, B.4). One way of achieving clearer definitions would be the introduction of “negative lists”, describing content/expressions/groups of persons *not* falling under the scope of the instrument. Such negative lists should include reference to expressions of folklore that have already been extended beyond the reach of a specific community or where the collective has developed only in recent times, such as with modern religious sects.

### 4. TCEs/EoF/TK and Freedom of Expression

The Consultation Documents, and in particular WIPO/GRTKF/IC/7/5 on TK protection, do not seek to protect specific manifestations but any manifestation of ideas and knowledge. This “catch-all” approach of the Consultation Documents means that the possibilities of freely using and disseminating content/expressions are severely restricted, thereby also curtailing the freedom of expression of individuals.

The impact on freedom of expression is extremely worrying in the area of traditional knowledge because of the effect of such limitations on the social, cultural and political dialogue and interactions within and outside of the local, national or international community.

### 5. Traditional knowledge administration and freedom of expression

The administrative framework proposed by the Consultation Documents creates a significant administrative burden. The substantial cost, which, unlike the patents system, is not balanced by commercial reward, and the potential for abuse are a major concern.

More importantly it also raises significant freedom of expression issues. The creation of a public administration that must be involved before a literary work can be published is a serious impediment on the freedom of expression and the freedom to publish of the writers and publishers respectively.

## 6. Traditional knowledge and the public domain

Material in the public domain remains an essential source of inspiration and forms part of the careful balance achieved in IP between the interests of the creator and the public. Publishing and other creative industries have always rejected the notion that after the expiry of IP protection any further payments should be made, i.e. “domain public payant”. The limitation of the commercial exploitation is part of the overall balance.

The proposals in the Consultation Documents do not limit the term of the proposed consideration. This concept is in breach of the well-understood balance of IP protection. Where “benefits” are shared, the compensation for the rights holding communities must be limited.

## 7. Benefit sharing

IPA would like to highlight the challenges that arise in the context of the use of the term “benefit sharing” in the Consultation Documents. Such a broad term creates a potential for misunderstanding. IP law, insofar as it is codified internationally, does not seek to interfere in the relationship between the creator and his or her commercial partners. The consideration given to creators can take many forms.

In many cases, use in the form of the publication of contents/expressions may in itself be sufficient consideration as it allows the beneficiaries to document their traditions, present their contents/expressions to a wider audience or to participate in the international dialogue of cultures. The new protection system should recognise the need for flexibility in this regard and leave it to the TCEs/EoF/TK owners and users to negotiate the terms of their agreement between themselves.

The new framework should also exercise restraint in dealing with continuing use of protected TCEs/EoF/TK following the entry into force of the protection system. Otherwise, it would violate the principle of legitimate expectations and jeopardise long term business models.

The above comments are preliminary and part of the ongoing consultation process IPA has with its rightsholders. We look forward to participating in the ongoing debate about these matters and look forward to a constructive solution of the aforementioned problems.