

ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE (OAPI)

The following comments were received through a communication from OAPI

OAPI congratulates the WIPO Secretariat for having provided the most faithful rendering of the various ideas put forward and issues dealt with in the course of the sessions of the Intergovernmental Committee. It therefore subscribes to both documents, and considers that the comments submitted below could contribute to the further improvement of these working instruments.

GENERAL COMMENTS

In OAPI's view, there appear to be three points on which there is disagreement:

- The necessary compatibility of traditional knowledge protection systems with existing intellectual property systems.
- The very strong predominance to be given to the national system as the only legal protection system, which is in marked conflict with the proposal of an international legal system.
- The holistic nature of the three areas is acknowledged, but no longer appears in the proposed machinery. Protection systems should indeed be designed separately, but not in isolation.

SPECIFIC COMMENTS

OAPI suggests:

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Chapter I : Policy objectives:

In paragraph (i), these sentences should be expanded to read "that benefit indigenous peoples, cultural communities, other cultures and all humanity;"

In paragraph (iv), "should they wish to do so" should be deleted, as the communities are expecting just that.

In paragraph (vi), the "of" before "traditional" in the last phrase should be deleted, and the phrase should read "...for the direct benefit of indigenous peoples and traditional and other cultural communities, and...". This correction should be repeated throughout the text.

In paragraph (viii), “particularly, when so desired by them,” and the comma preceding it should be deleted.

Paragraph (x) should be amended to read “contribute to the promotion and protection of the diversity of cultural contents and artistic expressions with a view to the enrichment of the culture of mankind, insofar as it highlights supreme human values without denying the specific cultural features that characterize peoples and groups;”.

In paragraph (xii), “invalid” should be replaced by “improper”. The text itself should be amended to read “curtail the grant, exercise and enforcement of improper intellectual property rights in TCEs/EoF, and derivatives thereof;”.

Chapter II : Core principles

A. General guiding principles

Principle of balance and proportionality: this should become “Principle of balance”. The wording of the principle should be “Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF and of those who use and benefit from them; the need to reconcile diverse policy concerns;...”.

Principle of respect for and cooperation with other international and regional instruments and processes: the whole principle should be removed.

Principle of flexibility and comprehensiveness: the last sentences should be deleted.

Principle of recognition of the specific nature, characteristics and traditional forms of cultural expression: in the first sentence, the “and” after “preservation should be replaced by a comma and the sentence should be completed as follows : “...and intra-cultural exchange, within one and the same people whose name or designation may vary on one side or another of a frontier”.

Principle of respect for customary use and transmission of TCEs/EoF: the idea of promotion should be removed, and the sentence should read “protections should not hamper the use, development, exchange, transmission and dissemination of TCEs/EoF...”.

Principle of effectiveness and accessibility of protection: the notion of enforcement should be removed, and the sentence should read “measures for the acquisition, exercise and management of the rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account...”.

B. Specific substantive principles

The following amendments to the number of articles as a result of the insertion of a new article mean that the documents should read as follows:

“B.1 Definitions

The following terms and alternatives thereto as used shall have the meanings specified :

(i) ‘Traditional cultural expressions or ‘expressions of folklore’ means productions consisting of characteristic elements of the traditional cultural heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.

(ii) ‘Community’ means indigenous peoples, traditional communities and other cultural communities.”

B.2 “Scope of subject matter” should become “Subject matter of protection” and the text should read as follows:

“(a) Traditional cultural expressions or expressions of folklore as defined in Article 1 include, for example, the following forms of expression or combination thereof:

- (i) verbal expressions such as folktales, folk poetry and riddles and aspects of languages such as words, signs, names, symbols and other indications;
- (ii) musical expressions such as folk songs and instrumental music;
- (iii) expressions by actions such as folk dances, plays and artistic forms or rituals, whether or not reduced to a material form; and
- (iv) tangible expressions such as:

- (a) productions of folk art, in particular drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket-weaving, handicrafts, needlework, textiles, carpets, costumes;
- (b) musical instruments;
- (c) architectural forms.

(b) The specific choice of terms to denote the protected subject matter may be determined at the national and regional levels.”

B.3 Criteria for protection

[amendment applicable to the French version only]

B.4 Beneficiaries

The beginning of the first paragraph should remain unchanged, and then should read “should serve the interest of communities

(i) to whom the custody and protection of the TCEs/EoF are entrusted in accordance with their customary law and practices, and...”.

B.5 Management of rights

The amendment should read as follows :

“(b) authorizations required to exploit TCEs/EoF should be obtained directly from the authority acting on behalf of and in the interests of the community. Where authorizations are granted by that administration,

(i) such authorizations should be granted only after appropriate consultations with the communities concerned, in accordance with their traditional decision-making and governance processes;”

Subparagraph (iv) as amended should read as follows:

“any monetary or non-monetary benefit deriving from the use of the TCEs/EoF should be passed on directly by the collecting authority to the community concerned;”

B.6 Scope of protection

The amendments should read as follows:

“(i) the prevention of:

- the reproduction, adaptation, communication to the public and other such forms of exploitation of TCEs/EoF of particular cultural or spiritual value (such as sacred TCEs/EoF), and derivatives thereof;
- the distortion, mutilation or other modification of such TCEs/EoF or other derogatory action in relation thereto;
- the unlawful acquisition by third parties of IP rights in TCEs/EoF;

(.....)

(iv) that, in the case of the use and exploitation of other TCEs/EoF,

- the communities concerned are identified as the source of any work derived from or inspired by the TCEs/EoF;
- [amendment applicable to the French version only].
- where the exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the competent administration.”

B.7 Exceptions and limitations

No change.

B.8 Term of protection

The amendments to the first subparagraph should read as follows: “Protection of any TCE/EoF should endure for as long as the TCE/EoF continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the community concerned.”

Paragraph (b) should be deleted.

B.9 Formalities

No change.

B.10 “Sanctions, remedies and enforcement” should become “Sanctions, remedies and exercise of rights”.

The amendments to the two paragraphs should read as follows:

“(a) Accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies should be provided for cases of breach of the protection of TCEs/EoF.

(b) An authority should be tasked with, among other things, advising and assisting communities with the exercise of rights and with instituting civil and criminal proceedings on their behalf when appropriate or requested by them.”

B.11 “Application in time” should be reworded as “Transitional measures”.

The word “encouraged” should be deleted from the second sentence, which should read “Long-standing prior use in good faith may be permitted to continue, but the users should be

required to acknowledge the source of the TCEs/EO F concerned and to share benefits with the original community.”

B.12 Relationship with intellectual property protection
No change.

B.13 International and regional protection

In subparagraph (a), the phrase “indigenous peoples and traditional and other cultural communities” should be deleted and replaced by “communities”.

In subparagraph (b), “should” should be deleted and replaced by “may”, and “among other things” should be added before “customary laws”.

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Chapter I: Policy Objectives:

In paragraph (iv), “provided for” should be deleted and replaced by “of”.

In paragraph (viii), the passage from “that recognize farmers’ rights” to “desertification” should be deleted, and the amendment should read as follows: “(viii) take due account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit -sharing from genetic resources which are associated with that traditional knowledge;”.

The amendment to subparagraph (ix) should read as follows:

“(ix) encourage, reward and protect tradition -based creativity and innovation; and promote innovation and the transfer of technology to the mutual advantage of holders and users of traditional knowledge”.

In paragraph (xii) [sic], “invalid” should be deleted and replaced by “improper”. We support more over the amendment proposed by Brazil, namely “and derivatives thereof”.

In paragraph (xiii), “invalid” should be deleted and replaced by “improper”.

[the proposed amendment to paragraph (xv) applies to the French version only]

Chapter II: Core principles

A. General guiding principles

Principle of effectiveness and accessibility of protection

In the last sentence, “enforcement procedures” should be replaced by “procedures for the exercise of rights”.

Principle of equity and benefit -sharing

We support the statement by Brazil, and propose amendments to both paragraphs reading as follows:

- “1. Protections should reflect the need for an equitable balance between her rights and interests of those who develop, preserve and sustain TK and of those who use and benefit from TK, and the need to reconcile diverse policy concerns.
2. Holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be compatible with measures conforming to the Convention on Biological Diversity, providing for a sharing of benefits arising from the utilization of genetic resources.”

Principle of consistency with existing legal systems

In paragraph 1, “if any,” and the comma preceding it should be deleted. With regard to paragraph 2, we support the statement by Brazil, and propose the following amendments: the phrase “and supportive of,” and the comma preceding it should be deleted, as should the remainder of the sentence, from “and should enhance” to the end of the paragraph.

Paragraph 2 would then read “Traditional knowledge protections should be consistent with existing IP systems where those systems promote the objectives of traditional knowledge protection.”

B. Specific substantive principles

B.1 Protection against misappropriation. The word “misappropriation” should be deleted and the title should read “protection against unlawful acts”. Misappropriation is indeed only one such unlawful act, and does not cover all the acts targeted.

The subheading “Suppression of misappropriation” should be deleted.

Paragraph 1 should read “Traditional knowledge shall be protected against unlawful acts.”

The subheading “General nature of misappropriation” should be deleted.

Paragraph 2 should read as follows:

“2. Any acquisition or appropriation of traditional knowledge by unfair or illicit means constitutes an unlawful act. Unlawful acts may also include deriving commercial benefit from the acquisition, appropriation or use of traditional knowledge when the person using that knowledge knows, or is grossly negligent in failing to know, that it was acquired or appropriated by unfair or unlawful means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge”.

The subheading “Acts of misappropriation” should be deleted.

In paragraph 3, the words “available” and “suppressed” should be deleted, and the sentence should read:

“3. In particular, legal means should be provided to prevent” (with the remainder of the paragraph unchanged).

The subheading “General protection against unfair competition” should be deleted.

The subheading “Recognition of the customary context” should be deleted.

In paragraph 5, the phrase “misappropriation of traditional knowledge” should be deleted and replaced by “unlawful acts”.

B.2 Legal form of protection

In paragraph 1, “among other things” should be added after “implemented” and “the law of torts, liability or civil obligations”, so that the paragraph becomes:

“1. Protection may be implemented, among other things, through a special law on traditional knowledge; the law on intellectual property, including unfair competition law and the law of unjust enrichment; the law on contracts and civil liability; criminal law; laws concerning the interests of indigenous peoples; regimes governing access and benefit sharing; or any other law or a combination of any of those laws.”

B.3 No change.

B.4 Eligibility for protection

The passage from “such as a sense of obligation” to “harmful or offensive” should be deleted so that the whole provision becomes: “protection should be extended at least to that traditional knowledge which is:

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
- (iii) integral to the cultural identity of an indigenous or traditional community which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility; this relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.”

B.5 Beneficiaries of protection

The last sentence should be deleted.

B.6 Equitable compensation and recognition of knowledge holders

“Equitable” should be deleted.

We support the statement by Brazil, and propose the following text for B.6:

“1. Use of traditional knowledge should be subject to just and appropriate compensation for the benefit of the traditional holder of the knowledge.

2. Those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders and use it in a manner that respects the cultural values of its holders.”

B.7 Principle of prior informed consent

In paragraph 1, “direct” should be deleted.

In paragraph 2, the passage from “and legitimate users of traditional knowledge” to “based on legal grounds” should be deleted.

Paragraph 3: No change.

B.8 Exceptions and limitations

Subparagraph (ii) should be deleted, and the remainder left unchanged.

B.9 Duration of protection

The word “misappropriation” and the passage from “in particular” to “those laws or measures” should be deleted. The paragraph thus becomes “protection of traditional knowledge against unlawful acts should last as long as the traditional knowledge fulfils the criteria of protection.”

B.10 Application in time: this should be “Transitional measures”.

The amendments would cause the paragraph to read as follows:
“Protection of traditional knowledge newly introduced in accordance with these principles should be applied to new acts of acquisition, appropriation and use of traditional knowledge. Acquisition, appropriation or use prior to the entry into force of the protection should be regularized within a reasonable period of that protection coming into force. There should however be equitable treatment for rights acquired by third parties in good faith”.

B.11 Formalities

In paragraph 1, “misappropriation and other acts of unfair competition” should be deleted so that the paragraph becomes:

“1. Eligibility for protection of traditional knowledge against unlawful acts should not require any formalities”.

Paragraph 2: no change.

B.12 Consistency with the general legal framework

Paragraph 1: No change.

In paragraph 2, delete from “and supportive of” to “traditional knowledge”.
The paragraph then becomes:

“2. Traditional knowledge protections should be consistent with existing intellectual property systems where those systems promote the achievement of the objectives of the said protection.”

The whole of paragraph 3 should be deleted.

B.13 Administration and enforcement of protection

In subparagraph (ii), the passage from “act of misappropriation” to “unfair competition” should be deleted and replaced by “unlawful act”, the comma after “in relation to” should be deleted and the remainder left unchanged.