

SAAMICOUNCIL

The following comments were received through a communication from the Saami Council.

Note from the Secretariat: The Saami Council's comments comprise a series of changes and comments made directly in Annex I to WIPO document WIPO/GRTKF/IC/7/3. Therefore, the Annex is reproduced below with the Saami Council's changes and comments, which are highlighted as received from the Saami Council.

[This informal paper reproduces Annex I of document WIPO/GRTKF/IC/7/3. These draft materials are put forward as one input only to facilitate continuing consideration and discussion of possible approaches to the Committee's work in preparing an overview of policy objectives and core principles. These are discussed and elaborated further in the full document.]

I. POLICY OBJECTIVES

The protection of traditional cultural expressions or expressions of folklore should aim to:

[Recognize value]

(i) recognize the intrinsic value of traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, commercial and educational value, and acknowledge that traditional cultures constituted diverse frameworks of ongoing innovation and creativity that benefit all humanity;

[Promote respect]

(ii) promote respect for traditional culture and folklore, and for the dignity, cultural integrity, and the intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

[Meet the actual needs of communities]

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and by traditional and cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural and social development of indigenous peoples and traditional and other cultural communities;

Note: The paragraph, as currently drafted, states that any policy should be guided by the aspirations and expectations expressed by TCE holders. Indigenous peoples are the holders of a substantial part of the world's collected TCEs. In more or less any discussion on protection of TCEs, indigenous peoples have underlined that any TCE protection system must respect their rights as holders and custodians of TCEs, including their human rights. Since the paragraph addresses the expectations of TCE holders, this should be explicitly stated in the paragraph. As a UN system organization, WIPO is bound by the UN Charter to respect human rights, as its member states.

[Empower communities]

(iv) be achieved in a manner inspired by the protection provided for intellectual creations and innovations, in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise

Deleted: and that

due rights and authority over their own TCEs/EoF, including through appropriate moral and economic rights, should they wish to do so;

Note: The paragraph has been amended to signify “rights” precedent over other interests.

[Support customary practices]

(v) respect and facilitate the continuing customary use, development, exchange and transmission of TCEs/EoF by, within and between these communities;

[Contribute to safeguarding traditional cultures]

(vi) contribute to the preservation and safeguarding of TCEs/EoF and the customary means for their development, preservation and transmission, and promote the conservation, application and wider use of TCEs/EoF, for the direct benefit of indigenous peoples and of traditional and other cultural communities, and for the benefit of humanity in general;

[Respect for and cooperation with relevant international agreements and processes]

(vii) recognize, and operate consistently with, other international and regional instruments and processes, including human rights law;

Deleted: processes;

Note: Again, under e.g. the UN Charter, any policy on protection of TCEs must comply with human rights standards. Since this is also the main concern of the majority of TCE holders, human rights law have been mentioned explicitly in the provision.

[Encourage community innovation and creativity]

(viii) encourage, reward and protect authentic tradition-based creativity and innovation, particularly, when so desired by them, by indigenous peoples and traditional and cultural communities and their members;

[Promote intellectual and cultural exchange]

(ix) provided consent by the TCEs/EoF holders, promote access to and the wider application of TCEs/EoF on terms fair and equitable to indigenous peoples and traditional and cultural communities, for the general public interest and as a means of sustainable development;

Deleted: promote, where appropriate,

Note: Access to TCEs should only be promoted provided agreement of relevant TCE holders.

[Contribute to cultural diversity]

(x) contribute to the promotion and protection of the diversity of cultural contents and artistic expressions;

[Promote community development and legitimate trading activities]

(xi) if it is so desired by the holders of TCEs/EoF, promote the use of TCEs/EoF for community-based development, recognizing them as a collective asset of the communities that identify with them; and promote the development of and expansion of marketing opportunities for authentic TCEs/EoF, particularly traditional arts and crafts.

Note: It is far from always indigenous peoples want to commercialize their TCEs.

[Preclude invalid IP rights]

(xii) curtail the grant, as well as the continued exercise and enforcement of already granted invalid intellectual property rights acquired by unauthorized parties over TCEs/EoF, and derivatives thereof;

Note: The amendment is not intended to change the content of the provision.

[Repress unfair and inequitable uses]
(xii bis) repress the misappropriation of TCEs/EoF and other unfair activities;

Note: The provision is copy of the corresponding provision in the TKP Policy.

[Enhance certainty, transparency and mutual confidence]

(xiii) enhance certainty, transparency and mutual respect and understanding in relations between indigenous peoples and traditional and cultural communities on the one hand, and academic, commercial, educational, government and other users of TCEs/EoF on the other; and

Note: The provision has been clarified to highlight that many governments are substantial users of TCEs/EoF.

[Complement protection of traditional knowledge]

(xiv) operate consistently with protection of traditional knowledge, respecting that for many communities knowledge and expressions of culture form an indivisible part of their holistic cultural identity.

II. CORE PRINCIPLES

A. General guiding principles

[These principles should be respected to ensure that the specific principles below concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection. Each principle is followed here by a brief description of the possible effect of the principle; a more complete description is provided in Annex II of WIPO/GTRKF/IC/7/3.]

Principle of responsiveness to aspirations and expectations of relevant communities

Protection should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities; in particular, it should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection, address cultural and economic aspects of development, address insulting, derogatory and offensive acts, enable full and effective participation by these communities, and recognize the inseparable quality of traditional knowledge and TCEs/EoF for many communities. Measures for the legal protection of TCEs/EoF should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own

customary and traditional forms of protection against unwanted access and use of their TCEs/EoF.

Principle of recognition of rights

The rights of traditional knowledge holders to the effective protection of their knowledge against misuse and misappropriation should be recognized and respected.

Note: The inserted provision is modeled after the corresponding provision in the TK Policy, slightly amended.

Principle of balance and proportionality

Protections should respect the right of indigenous peoples and other holders of TCEs/EoF to consent or not consent to access to their TCEs/EoF, and should, provided that free, prior and informed consent has been obtained, 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; and the need for specific protection measures to be proportionate to the objectives of protection, actual experiences and needs, and the maintenance of an equitable balance of interests.

Note: This paragraph needs to be reformulated so that it adequately distinguishes between different rights and interests. As currently drafted, the paragraph appears to presume that there is always a right to access that only needs to be balanced against other rights. As mentioned above, such is obviously not the case. If for example indigenous peoples hold property rights, other human rights etc. to TCEs or if the TCE falls within the scope of indigenous peoples' right to self-determination, there can be no sharing unless the relevant indigenous peoples agree, and only on their terms and conditions. There is then no room for any balancing. In other words, "those that use TCEs" have no rights to those particular TCEs, and there can thus be no balancing between the users' interest and the rights of the holders.

Principle of respect for and cooperation with other international and regional instruments and processes

TCEs/EoF should be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already codified in or established under binding legal instruments and international customary law. These principles are not intended to pre-empt the elaboration of other instruments or the work of other processes which address the role of TCEs/EoF in other policy areas.

Note: Not all relevant international law has necessarily been codified in instruments. In line therewith, not all provisions contained in international instruments establish obligations. Equally often, they merely underline already binding principles.

Principle of flexibility and comprehensiveness

Protections should respect the diversity of TCEs/EoF and the wider range of needs of the beneficiaries of protection, should acknowledge diversity in national circumstances and legal

systems, and should allow sufficient flexibility for national authorities to determine the appropriate means of achieving the objectives of protection, subject to international law. Protection may accordingly draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *suu* *generis* extensions or adaptations of IP rights, and specially -created *suu* *generis* IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with non-proprietary and non-IP measures.

Deleted: protection.

Note: Means of protection must certainly be adapted depending on the local context. In order to safeguard against regimes that violate the rights of indigenous peoples, it is necessary to underline, however, that whatever measures taken must be in compliance with international law, including human rights.

Principle of recognition of the specific nature, characteristics and traditional forms of cultural expression

Protections should respond to the traditional character of TCEs/EoF; their collective or communal context and the inter-generational character of their development, preservation and transmission; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. Special measures for legal protections should also recognize that in practice TCEs/EoF are not always created within firmly bounded identifiable 'communities' that can be treated as legal persons or unified actors. TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence.

Principle of respect for customary use and transmission of TCEs/EoF

If it is desired by the holders of TCEs/EoF, protection should promote the use, development, exchange, transmission and dissemination of TCEs/EoF by the communities concerned in accordance with their customary laws and practices. No contemporary use of a TCE/EoF within the community which has developed and maintained it should be regarded as distorting if the community identifies itself with that use of the expression and any modification entailed by that use. Customary use, practices and norms should guide the legal protection of TCEs/EoF as far as possible, on such questions as ownership of rights, management of rights and communal decision-making, equitable sharing of benefits, exceptions and limitations to rights and remedies.

Deleted: Protection

Note: Indigenous peoples etc. might not always want to promote exchange or transmission of their TCEs.

Principle of effectiveness and accessibility of protection

Measures for the acquisition, management and enforcement of rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account of the cultural, social, political and economic context of indigenous peoples and traditional and other cultural communities. National authorities should make available appropriate enforcement procedures that permit effective action against misappropriation of traditional knowledge and violation of the principle of prior informed consent.

Deleted: communities.¶

Note: The addition is picked from the corresponding provision in the TK Draft Policy.

B. Specific substantive principles

B.1 Scope of subject matter

(a) 'Traditional cultural expressions' or 'expression of folklore' may be understood as including 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. Such productions may include, for example, the following forms of expressions, or combination thereof:

- (i) verbal expressions, such as folk tales, folk poetry and riddles; aspects of language such as words, signs, names, symbols and other indications;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, 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) production 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 do not; the protected subject matter should be determined at the national and regional levels subject to international law.

B.2 Criteria for protection

TCEs/EoF are protectable, whatever the mode or form of their expression, provided they are:

- (i) the products of creative intellectual activity, including collective and cumulative creativity; and
- (ii) characteristic of a community's distinctive cultural identity and traditional heritage developed and maintained by it.

B.3 Beneficiaries

Measures for the protection of TCEs/EoF should be for the benefit of the indigenous peoples and traditional and other cultural communities:

- (i) in whom the custody and protection of the TCEs/EoF are entrusted in accordance with the customary law and practices of that community; and
- (ii) whom maintain and use the TCEs/EoF as being characteristic of their traditional cultural heritage.

B.4 Recognition of the customary context

The application, interpretation and enforcement of protection against misappropriation of TCEs/EoF, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of indigenous peoples and traditional and local communities.

Deleted: Management of rights

(a) To ensure the effectiveness of protection of TCEs/EoF, a responsible authority, which may be an existing office or agency, should be tasked with awareness-raising, education, advice and guidance, monitoring, dispute resolution and other functions.¶
(b) Authorizations required to exploit TCEs/EoF should be obtained either directly from the community concerned or the authority acting on behalf of and in the interests of the community. Where authorizations are granted by the authority: ¶
<#> such authorizations should be granted only after appropriate consultations with the relevant indigenous people/s or traditional or other community/ies, in accordance with their traditional decision-making and governance processes; ¶

including the spiritual, sacred or ceremonial characteristics of the traditional origin of the TCEs/EoF.

Note: The provision is modeled after the corresponding provision in the TKP Policy.

B5: Principle of Prior Informed Consent

1. The principle of prior informed consent should govern any direct access or acquisition of TCEs/EoF from indigenous peoples or other traditional holders, subject to these principles.

2. Legal systems or mechanisms for obtaining prior informed consent should ensure legal certainty and clarity; should not create burdens for traditional holders and legitimate users of TCEs/EoF; should ensure that restrictions on access to TCEs/EoF are transparent and based on legal grounds; and should provide for mutually agreed terms for the equitable sharing of benefits arising from the use of TCEs/EoF.

3. The holders of TCEs/EoF shall be entitled to grant prior informed consent for access to TCEs/EoF, or to approve the grant of such consent by an appropriate national authority.

4. As a general rule, the principle of prior informed consent applies also to TCEs/EoF which is already readily available to the general public, but due consideration should be given to the interests of third parties that have acquired TCEs/EoF in good faith. Use of TCEs/EoF already available to the general public in a manner that is fair and equitable given the interests of those from which the TCEs/EoF originates, might be excluded from the principle of free, prior and informed consent, provided that users of that TCEs/EoF provide equitable compensation to the originators. Continuing uses of TCEs/EoF that had commenced prior to the introduction of new measures that protect such TCEs/EoF should be brought into conformity with those measures within a reasonable period of time after the measures enter into force, with due consideration given to interests of third parties that have used the TCEs/EoF in good faith. With regard to use of TCEs/EoF already available to the general public, there shall be adequate measures to ensure:

(i) the prevention of: the reproduction, adaptation, public communication and other such forms of exploitation of; any distortion, mutilation or other modification of, or other derogatory action in relation to; and the acquisition by third parties of IP right over, TCEs/EoF of particular cultural or spiritual value or significance (such as sacred TCEs/EoF), and derivative thereof;

(ii) the prevention of the unauthorized disclosure and subsequent use of and acquisition by third parties of IP right over secret TCEs/EoF;

(iii) in respect of performances of TCEs/EoF, the protection of moral and economic rights as required by the WIPO Performances and Phonograms Treaty, 1996; and

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

– the relevant indigenous, traditional or other cultural communities are identified as the source of any work derived from or inspired by the TCEs/EoF;

– any distortion, mutilation or other modification of, or other derogatory action in relation to a TCE/EoF, which would offend against or be prejudicial to the reputation, customary values or cultural identity or integrity of the community, can be prevented and/or is subject to civil or criminal sanctions;

– any false, confusing or misleading indications or allegations in the course of trade and contrary to honest business practices, as to the origin, the nature, the manufacturing process, the characteristics, the suitability for their purpose, the quantity, endorsement by or

Formatted: Bullets and Numbering

Deleted: such authorizations should comply with the scope of protection provided for the TCEs/EoF concerned and should in particular provide

Deleted: from their use;

Deleted: <#>uncertainties or disputes as to which communities are concerned should be resolved as far as possible with reference to customary laws and practices; ¶ <#>any monetary or non-monetary benefits collected by the authority for the use of the TCEs/EoF should be provided directly by the authority to the indigenous people or traditional or other community concerned; ¶ <#>enabling legislation, regulations or administrative measures should provide guidance on matters such as procedures for applications for authorization; fees, if any, that the authority may charge for its services; public notification procedures; the resolution of disputes; and the terms and conditions upon which authorizations may be granted by the authority. ¶

¶ B.5 Scope of protection ¶

Deleted: There

linkage with the community of goods or services that refer to, draw upon or evoke TCEs/EoF can be prevented and/or is subject to civil or criminal sanctions; and

Note: These provisions address the fundamental issue of public domain, and are modeled after the corresponding provisions in the TK Policy, with certain modifications. Again, rendering the principle of FPIC subject to national legislation and to the whim of national authorities would in effect make the provision meaningless. The Saami Council further reiterates that there appears to be little point in crafting an international policy if national legislation is to govern the most central issues that the policy addresses regardless. Indigenous representatives have repeatedly stressed that the notion of public domain, as understood by conventional IPR law, is perhaps the most problematic issue when it comes to achieving a more adequate protection for TCEs/EoF. The Saami Council understands that it might not be practically feasible, or perhaps even beneficial, suddenly to prohibit all use of TCEs/EoF currently regarded to be in the public domain. On the other hand, as the provision is currently drafted, it offers more or less no protection at all for TCEs/EoF in the public domain. It is necessary to strike a better balance. The amendment strives to achieve that end.

Deleted: whether the exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by a competent authority and the relevant community.

Formatted: Bullets and Numbering

B.6 Management of rights

(a) To ensure the effectiveness of protection of TCEs/EoF, a responsible authority, which may be an existing office or agency, should be tasked with awareness-raising, education, advice and guidance, monitoring, dispute resolution and other functions.

(b) Authorizations required to exploit TCEs/EoF should be obtained directly from the indigenous people or community concerned.

(i) such authorizations should be granted only after the relevant indigenous people or traditional or other community/ies have given their free, prior and informed consent, in accordance with their traditional decision-making and governance processes;

(ii) such authorizations should comply with the scope of protection provided for the TCEs/EoF concerned and should, when applicable, provide for the equitable sharing of benefits from their use;

(iii) uncertainties or disputes as to which communities are concerned should be resolved as far as possible with reference to customary laws and practices;

(iv) any monetary or non-monetary benefits should be paid directly to the indigenous people or traditional or other community concerned;

(v) enabling legislation, regulations or administrative measures should provide guidance on matters such as procedures for applications for authorization; public notification procedures; and the resolution of disputes.

Formatted: Bullets and Numbering

Note: There is no reason why an authority should act on behalf of indigenous peoples. Indigenous peoples are self-determining entities, capable of administering their own affairs. If they need assistance administering these kinds of affairs, they can arrange with that themselves. The provision, as currently drafted, opens up for misuse.

B.7 Exceptions and limitations

Deleted: B.6

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 utilization of TCEs/EoF outside the traditional or customary context, whether or not for commercial gain;

Note: There is an issue dealt with in subparagraph (iii) have been addressed above.

B.8 Term of protection

(a) 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 relevant indigenous people or traditional or cultural community.

(b) Measures for the protection of TCEs/EoF could specify circumstances in which an expression will be deemed no longer to be characteristic of a relevant people or community subject to international law.

Deleted: be subject to the same kind of limitations as are permitted with respect to the protection of literary and artistic works, designs, trademarks and other IP, as relevant and as the case may be. Such limitations should not, however, permit the use of TCEs/EoF in ways that would be offensive to the relevant community.

Formatted: Bullets and Numbering

Deleted: B.7

B.9 Formalities

(a) The protection of TCEs/EoF should not be subject to any formalities.

(b) In the interests of transparency and certainty, measures for the protection of TCEs/EoF may require that certain categories of TCEs/EoF for which protection is sought should be notified to a competent authority, subject to the consent of the relevant indigenous people or local community, including TCEs/EoF of particular cultural or spiritual value or significance such as sacred TCEs/EoF. Such notification would have a declaratory function, would not in itself constitute rights, and could contribute towards 'positive' and/or 'defensive' forms of protection. It should not involve or require the documentation, recordal or public disclosure of the TCEs/EoF.

Deleted: B.8

B.10 Sanctions, remedies and enforcement

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

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

Deleted: B.9

Note: Certain elements of this provision have been incorporated into B4. The rest of the provision has been deleted, since the issue has already been covered in B8.

B.11 Relationship with intellectual property protection

Special protection for TCEs/EoF should not replace and be complementary to any protection applicable to TCEs/EoF and derivatives thereof under other intellectual property laws.

B.12 International and regional protection

(a) Legal and administrative mechanisms should be established to provide effective protection in national systems for the TCEs/EoF of foreign rightsholders. Measures should be established to facilitate as far as possible the acquisition, management and enforcement of such protection for the benefit of indigenous peoples and traditional and other cultural communities in foreign countries.

(b) Existing or new regional organizations should be tasked with resolving competing claims to TCEs/EoF by communities within distinct countries, using customary

Deleted: B.10 Application in time
Continuing uses of TCEs/EoF that had commenced prior to the introduction of new measures that protect such TCEs/EoF should be brought into conformity with those measures within a reasonable period of time after the measures enter into force, subject to equitable treatment of rights and interests acquired by third parties through prior use in good faith. Long-standing prior use in good faith may be permitted to continue, but the users should be encouraged to acknowledge the source of the TCEs/EoF concerned and to share benefits with the original community. Other users should cease at the end of a reasonable transition period.

laws, local information resources, alternative dispute resolution (ADR) and others such practical arrangements as necessary.