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**Eleventh Session
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THE PROTECTION OF TRADITIONAL CULTURAL
EXPRESSIONS/EXPRESSIONS OF FOLKLORE

ADDENDUM TO COLLATION OF WRITTEN COMMENTS ON THE LIST OF
ISSUES

Document prepared by the Secretariat

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') decided at its tenth session on an intersessional commentary process concerning the List of Issues relating to traditional cultural expressions/expressions of folklore established by the Committee. The Annex to document WIPO/GRTKF/IC/11/4(a) entitled "Collation of Written Comments on the List of Issues" contains those comments received by the WIPO Secretariat up to April 30, 2007, in line with the intersessional commentary process. The Annex to document WIPO/GRTKF/IC/11/4(a) Add. contains additional comments received after the publication of the first collation in document WIPO/GRTKF/IC/11/4(a).

2. The Annex to the present document contains further comments received after the publication of the two first documents.

3. The Committee is invited to review and discuss the comments collated in the Annex in addition to those circulated with documents WIPO/GRTKF/IC/11/4 (a) and WIPO/GRTKF/IC/11/4 (a) Add.

[Annex follows]

COMMENTS RECEIVED ON
THE LIST OF ISSUES CONCERNING PROTECTION OF
TRADITIONAL CULTURAL EXPRESSIONS

TABLE OF CONTENTS

GENERAL

I. DEFINITION OF TRADITIONAL CULTURAL EXPRESSIONS (TCES)/EXPRESSIONS OF FOLKLORE (EOF) THAT SHOULD BE PROTECTED.....	4
II. WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO HOLD THE RIGHTS TO PROTECTABLE TCES/EOF?.....	5
III. WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS, MORAL RIGHTS)?	6
IV. WHAT FORMS OF BEHAVIOR IN RELATION TO THE PROTECTABLE TCES/EOF SHOULD BE CONSIDERED UNACCEPTABLE/ILLEGAL?	7
V. SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS ATTACHING TO PROTECTABLE TCES/EOF?	8
VI. FOR HOW LONG SHOULD PROTECTION BE ACCORDED?	9
VII. TO WHAT EXTENT DO EXISTING IPRS ALREADY AFFORD PROTECTION? WHAT GAPS NEED TO BE FILLED?	10
VIII. WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO BEHAVIOR OR ACTS CONSIDERED TO BE UNACCEPTABLE/ILLEGAL?	11
IX. WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?.....	12
X. HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE TREATED? ...	13

GENERAL COMMENTS

Arts Law Centre of Australia

The overarching goal should be to stop the widespread misappropriation of Traditional Cultural Expressions.

There is an urgent need to protect cultural heritage which is vulnerable to powerful commercial interests e.g. rock art sites

The Intergovernmental Committee should encourage nations to take action now to put in place positive protections given it is clear that gaps currently exist

A fundamental principle of the protective framework is that Traditional Cultural Expressions are not used without consent of custodians.

It is interesting that Indigenous participants are generally advocating for a binding international instrument contrary to the position of many Government representatives.

I. DEFINITION OF TRADITIONAL CULTURAL EXPRESSIONS
(TCES)/EXPRESSIONS OF FOLKLORE (EOF) THAT SHOULD BE PROTECTED.

Arts Law Centre of Australia

The definition as set out in Article 1 of the Substantive Principles of the Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (Article 1) provides a useful basis for further discussion.

It is important that the definition recognizes the dynamic nature of Traditional Cultural Expressions i.e. they are living cultures rather than museum pieces.

It is important to acknowledge the fundamental and inseparable connection between Traditional Cultural Expressions and Traditional Knowledge.

II. WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO HOLD THE RIGHTS TO PROTECTABLE TCES/EOF?

Arts Law Centre of Australia

Article 2 provides a good starting point for discussion on beneficiaries and rights holders.

Rights to Traditional Cultural Expressions and any benefits should be held by Indigenous peoples and their communities who are directly connected to the Traditional Cultural Expressions.

Article 2 could be problematic if communities are required to prove that they have been “entrusted in accordance with customary law and practices”. There may be evidentiary difficulties in view of histories of widespread dislocation. E.g. in Australia Indigenous groups claiming native title rights who have to prove continuous connection with land have faced huge hurdles in this regard and it is not unusual for cases to take over 10 years to resolve.

There should be an assumption in favor of the Indigenous community claiming to be custodians of Traditional Cultural Expressions.

A further issue arises where there are multiple communities with responsibility for the Traditional Cultural Expressions e.g. certain dreaming stories in Australian Indigenous culture. There is a need to recognize that there may be more than one community which is the rights holder and receives benefits in view of diversity of Indigenous cultures in Australia.

As a matter of principle, the State should generally not exercise rights on behalf of Indigenous communities in view of histories of States misappropriating benefits owing to Indigenous people, for example the Stolen Wages cases in Australia. This raises the question where there is no clear Indigenous rights holder or beneficiary whether States should hold rights and benefits in trust for Indigenous peoples.

III. WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS, MORAL RIGHTS)?

Arts Law Centre of Australia

Objectives set out in the Draft Objectives form a useful basis for further discussions. Key issues include:

- Need to preserve Indigenous cultural heritage from damage and destruction given that damage to Traditional Cultural Expressions causes harm to Indigenous people themselves.
 - Recognizing the increased market value of Traditional Cultural Expressions puts greater pressures on Indigenous cultures and increases the likelihood of misappropriation.
 - Providing stronger protections will encourage best practice and deter misappropriation.
 - Indigenous communities should have control over management of Traditional Cultural Expressions and 3rd parties wanting to use Traditional Cultural Expressions should obtain their consent.
 - We query the benefits of collective administration or potential for increased bureaucratic bodies absorbing potential benefits to communities.
 - There is a need to stop misappropriation of Traditional Cultural Expressions whether or not registered. A registration requirement should not be condition precedent to obtaining benefits, especially protections.
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IV. WHAT FORMS OF BEHAVIOR IN RELATION TO THE PROTECTABLE TCEs/EOF SHOULD BE CONSIDERED UNACCEPTABLE/ILLEGAL?

Arts Law Centre of Australia

The primary objective should be to provide a range of protections for behaviors falling under the broad heading of “misappropriation”. The rights and ability to access remedies should not be predicated upon Traditional Cultural Expressions being registered.

Behaviors that should be addressed include:

- Use of TCEs without the consent of the custodians e.g. reproduction, adaptation, publication, performance, broadcasting, communication to the public etc;
 - Commercialization of TCEs without financial benefit sharing;
 - Derogatory treatment of TCEs;
 - Damage or destruction of TCEs;
 - No attribution, or incorrect attribution, of custodians of TCEs;
 - Disclosure of secret and sacred materials;
 - Appropriation of Indigenous languages and words; and,
 - Fixations of live performances and ceremonies without consent.
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V. SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS ATTACHING TO PROTECTABLE TCES/EOF?

Arts Law Centre of Australia

Article 5 provides a useful starting point. However, in view of the history of appropriation of Traditional Cultural Expressions by academics and institutions (museums, galleries and archives) there may be problems if exceptions are allowed for:

- Non-commercial research or study; and
- Inclusion in archives, libraries, museums and galleries.

There needs to be a requirement that adequate controls by Indigenous peoples are in place before allowing these exceptions.

VI. FOR HOW LONG SHOULD PROTECTION BE ACCORDED?

Arts Law Centre of Australia

Article 6 provides an adequate starting point once the registration requirement is removed. Protection should be provided in perpetuity or as long as community exists to act as custodian of TCE.

VII. TO WHAT EXTENT DO EXISTING IPRS ALREADY AFFORD PROTECTION?
WHAT GAPS NEED TO BE FILLED?

Arts Law Centre of Australia

IPRs provide limited protections for Traditional Cultural Expressions through the legal mechanisms discussed at previous IGC meetings and documents:

- Copyright
- Moral rights
- Trade marks
- Performers' rights
- Passing off laws
- Trade Practices/consumer protection laws
- Heritage laws
- Law of confidentiality
- Trade secrets

The gaps that exist in Australia have previously been set out in IGC documents. They include:

- Community or collective ownership of Traditional Cultural Expressions.
 - Limited duration of Intellectual Property Rights whereas Traditional Cultural Expressions need protection in perpetuity.
 - Many types of Traditional Cultural Expressions are oral or performance traditions and are not fixed in material form.
 - The Traditional Cultural Expressions are shared knowledge and handed down from generation to generation rather than individually owned.
 - Some Traditional Cultural Expressions do not fall within categories of material that have IPR protection e.g. ceremonies; language.
 - In Australia, the Government has been considering provision of Indigenous Communal Moral Rights which could provide some protection to communities where Traditional Cultural Expressions are embodied in a work or subject matter other than work protected under Copyright laws. To date no legislation has been tabled in Parliament.
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VIII. WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO BEHAVIOR OR ACTS
CONSIDERED TO BE UNACCEPTABLE/ILLEGAL?

Arts Law Centre of Australia

Article 8 provides an adequate basis for further discussion on sanctions.

A range of civil and criminal sanctions should be available, with criminal sanctions applying to most serious illegal acts. Sanctions must be accessible and enforceable by Indigenous peoples.

IX. WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?

Arts Law Centre of Australia

An International treaty which is binding on signatories would be a useful goal for the protection of Traditional Cultural Expressions. This needs to be enforceable against 3rd party countries *e.g.* in Australia there is widespread infringement of Traditional Cultural Expressions of Indigenous Australians through extensive importation of “Aboriginal-style” arts and crafts which are sold on the tourist market. As long as the work does not breach consumer protection laws or copyright laws, there is no prohibition on such behaviors.

An international treaty would also provide a useful framework to develop an adequate system of national legislation.

X. HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE TREATED?

Arts Law Centre of Australia

Principle of national treatment should be applied. Article 11 provides a useful basis for discussion.

[End of Annex and of document]