

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Eighteenth Session
Geneva, May 9 to 13, 2011

NOTE ON THE CHAIR'S INFORMAL CONSULTATIONS ON DRAFT ARTICLES ON TRADITIONAL CULTURAL EXPRESSIONS

Document prepared by the Secretariat

1. At its seventeenth session, held from December 6 to 10, 2010, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee") invited the Chair, Ambassador Philip Owade, to undertake informal consultations with all delegations before the next session of the Committee and to prepare, if possible, a further draft of the articles on traditional cultural expressions (a Chair's text) for consideration by the Committee at its next session.¹
2. A consultation process was initiated by the Chair and ran from February 10 to March 31, 2011. It was inclusive and open to all Committee participants, i.e., delegations of Member States and representatives from accredited observers. It was not open to the public.
3. Since the Chair had indicated that these informal broad-based consultations would be conducted "without holding a physical meeting" and that "he would not touch on policy questions which were for the IGC to negotiate,"² the WIPO Secretariat hosted an electronic forum on its wiki platform to assist the Chair in the consultation process.

¹ Draft Report of the Seventeenth Session of the Committee (WIPO/GRTKF/IC/17/12 Prov. 2).

² *Ibid.*, para. 335.

4. This forum was designed to enable Committee participants to take part in a virtual exchange with the Chair and among themselves, with a view to further refining, streamlining and simplifying the draft articles and, in particular, reducing the number of options and alternative proposals. The “Draft Articles of the Open-Ended Informal Drafting Group of IGC 17,” dated December 9, 2010, 8:10 PM, were made available for the consultation. To instigate this editorial exercise and to initiate discussion, the Chair posted questions and proposals on the wiki; they are reproduced in the Annex. Information on the consultation process, and in particular how the Committee participants could register, was contained in a circular letter dated February 8, 2011, and sent to all participants. Committee participants were invited to register in order to gain access to the wiki. Applications for registrations were individually reviewed by a member of the WIPO Secretariat to ensure that only Committee participants would have access to the wiki.
5. In the end, 50 Committee participants registered and five of them commented during the consultation period.
6. At the close of the consultation, in view of the limited number of comments, the Chair decided not to prepare a revised version of the draft articles.
7. Although the consultation process has ended, the comments posted on the forum remain available for consideration by Committee participants. Participants who have not yet registered may still do so in order to view the comments and are invited to contact the Secretariat (at grtkf@wipo.int) for guidance on how to register.

8. *The Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

ANNEX

Questions and Proposals by the Chair

General

- Could the word “Indigenous” be capitalized throughout the text?

It has been argued by some that Indigenous peoples consider it disrespectful to use the term “Indigenous” otherwise than with a capital “I” and that, therefore, the word “Indigenous” should appear with a capital “I” throughout the draft articles. This spelling would be consistent with the one used in the United Nations Declaration on the Rights of Indigenous Peoples.

- Could the word “peoples” always be in plural?

Some have argued that the term “Indigenous peoples” should always appear in the plural, i.e., with an “s” throughout the draft articles. This spelling would be consistent with the one used in the United Nations Declaration on the Rights of Indigenous Peoples.

- Could the references to “national/domestic law” be streamlined so that either “national” or “domestic” is used?

The term “domestic” is understood as “of or relating to one’s own country” or “of or relating to one’s own jurisdiction.” (Black’s Law Dictionary). “National law” may be understood as a synonym of domestic law. It may also be understood, in federated countries, as the law of the highest level of jurisdiction, as opposed to, e.g., provincial, state, municipal or local law. In this case, the term “national” could be narrower in scope than “domestic” and reflect a different reality.

Article 1 – Subject Matter of Protection

- In paragraph 1, the text, as it is currently drafted, presents two options in the same sentence, making the text difficult to read. Could the alternatives be split, so that the text could appear as:

“Traditional cultural expressions” are

Option 1: any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on [from generation to generation],

Option 2: tangible or intangible forms of creativity of the beneficiaries, as defined in Article 2, including, but not limited to:[...].”

- Paragraph 1, subparagraphs (a) to (d), could be formulated in a concise way by deleting the list of examples (starting with “such as”), but keeping the introductory category labels:

“(a) phonetic or verbal expressions;

(b) musical or sound expressions;

(c) expressions by action;

whether fixed or unfixed;

(d) tangible expressions.”

It could be left to national legislation to specify the types of expressions that could be the subject matter of protection. The international instrument would provide the broad framework, which each signatory party could use to define more specific objects of protection.

- Likewise, these labels, or main types of expressions, could also be deleted to provide an even more streamlined version.

- Paragraph 2, as it is currently worded, uses terms that may either be redundant or contradict each other. For example, the various terms “unique”, “characteristic,” “indicative,” “genuine”, etc. are used. Could the text be streamlined to avoid such redundancy or contradiction? These also occur with respect to Article 2. The idea would be to ensure clarity in the text, independently of which term or terms are to be chosen.

Article 2 – Beneficiaries

- Could a uniform designation of beneficiaries be established throughout the text, e.g.: “Beneficiaries” or “Beneficiaries as defined in Article 2”?

Article 2 could provide the general definition or description of “beneficiaries” for the purposes of the text. Any listing of examples of beneficiaries in other articles would then be deleted. Reference would then simply be made to “beneficiaries” throughout the text, except in Article 2, where the term would be defined or described.

- Could the reference to “individuals” be kept?

It has been suggested that individuals could sometimes be considered as beneficiaries. A text on traditional knowledge (WIPO/GRTKF/IC/18/5 Prov.) provides for such cases.

- Could the second cluster of options (starting with “in accordance with...”) be deleted?

This would help in streamlining the text. These matters could be left to be dealt with at the national level.

- Could the capital letters to the words referring to categories of beneficiaries (such as “communities”, “nations,” etc.) be removed?

Article 3 – Scope of Protection

- Could one of the three alternatives be selected to form the basis of further negotiations?

Alternative 1

- In Article B, could the reference to “IPLC” be deleted? In keeping with that change, could the word “has” be replaced with “have” to ensure grammatical correctness?
- Could the last paragraph under Article B (starting with “in the case where the unauthorized user...”) be deleted? Alternatively, could the wording be refined, especially of “and did not,” to avoid confusion?
- Could the repetition between Articles B and C be reduced?

Alternative 2

- In Article B, could the reference to “Articles 1 and 2,” be inverted for logical purposes? The text would then state: “Articles 2 and 1.”
- Could one of the two options of “*unless this turns out to be impossible*” and “*except where omission is dictated by the manner of the use*” be chosen?

Alternative 3

- Could the repetition of the word “disclosure” in the first line of paragraph 1 be avoided?

Article 4 – Collective Management of Rights

- Could the text be simplified considerably, leaving much of the detail in the current draft to be dealt with at the national level? Which elements could be deleted to reach a shorter version?

The national level should be the level at which such choices are made.

Article 5 – Exceptions and Limitations

- Could one of the two proposed paragraphs 2 (currently, 2 and 2. Alt) be chosen as the basis for further negotiations?
- Simply for grammatical purposes, could an “s” be added to the word “exception”?

The text of paragraph 2 would then read: “[It shall be a matter of national/domestic legislation in accordance with the Berne Convention and the WIPO Copyright Treaty to provide exceptions and to permit the use...”

- Could the reference to the “WCT” be changed to the “WIPO Copyright Treaty”?

Article 6 – Term of Protection

- Could options 1 and 2 be merged?

Article 8 – Sanctions, Remedies and Exercise of Rights

- Which elements could be used to form one single option?
- Could Article 8bis be considered as a stand alone new Article 9, or be integrated into Article 8 as a new paragraph?

Article 9 – Transitional Measures

- Could the text of paragraph 3 be made clearer to avoid confusion between the recovering of the TCEs themselves (as objects of cultural property) and the recovering of rights?

There is currently confusion as to the aim of said paragraph. It might also conflict with other international instruments on cultural property, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

Article 10 – Relationship with Intellectual Property and Other Forms of Protection, Preservation and Promotion

- Could the second paragraph of option 1 be deleted or clarified?

It has been argued that the text concerned does not belong in an intellectual property instrument.

[End of Annex and of document]