

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

**Eighteenth Session**  
**Geneva, May 9 to 13, 2011**

### **GLOSSARY OF KEY TERMS RELATED TO INTELLECTUAL PROPERTY AND 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') decided that the Secretariat should "prepare and make available, as an information document for the next session of the Committee, a glossary on intellectual property and traditional cultural expressions as recommended by the first Intersessional Working Group (IWG 1) in its Summary Report (WIPO/GRTKF/IC/17/8)".<sup>1</sup>
2. The present document draws, as far as possible, from previous glossaries of the Committee and from existing United Nations and other international instruments. The document also takes into account definitions and glossaries which can be found in national and regional laws and draft laws, multilateral instruments, other organizations and processes and in dictionaries. Further, definitions are based on working documents of the Committee, other WIPO documents and documents of other work programs of WIPO. That said, the proposed definitions are not exhaustive. Other terms may also be relevant to intellectual property and traditional cultural expressions, and the terms selected may also be defined in other ways.

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

3. The selection of key terms is based on the terms used most frequently in document WIPO/GRTKF/IC/18/4 Rev. and other related documents. The selection and proposed definitions contained in the Annex are without prejudice to any other glossary or definitions of key terms contained in previous documents of this Committee or in any other international, regional or national instrument or fora. The selection and proposed definitions of key terms are not intended to suggest that the selection of terms or their proposed definitions are necessarily agreed upon by participants in the Committee. This is an information document and the Committee is not requested to endorse or adopt neither the selection of terms nor their proposed definitions.
4. Pursuant to the decisions of the Committee taken at its sixteenth and seventeenth session, respectively, a “Glossary of Key Terms Related to Intellectual Property and Genetic Resources” (WIPO/GRTKF/IC/17/INF/13) and a “Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge” (WIPO/GRTKF/IC/18/INF/8) have been prepared. Some terms contained in those glossaries are also included in the present document, insofar as they are related to traditional cultural expressions. The Committee might wish to consider whether the three glossaries should eventually be consolidated into one, noting that some terms are related to genetic resources, traditional knowledge and traditional cultural expressions.

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

[Annex follows]

## ANNEX

### GLOSSARY OF KEY TERMS RELATED TO INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS

#### **Adaptation**

Adaptation is the act of altering a pre-existing work (either protected or in the public domain) or a traditional cultural expression, for a purpose other than for which it originally served, in a way that a new work comes into being in which the elements of the pre-existing work and the new elements—added as a result of the alteration—merge together.<sup>1</sup>

Black's Law Dictionary<sup>2</sup> provides that copyright holders have the exclusive right to prepare derivative works, or adaptations, based on the protected work. Article 12 of the Berne Convention for the Protection of Literary and Artistic Works, Paris Act, 1971 (the Berne Convention), provides that authors of literary and artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.

#### **Approval and involvement**

There is no universally accepted definition of the term.

It has been suggested in one context that although Article 8(j) of the Convention on Biological Diversity, 1992, uses the phrase "approval and involvement," various decisions on Article 8(j) have consistently interpreted this term to mean "prior and informed consent."<sup>3</sup>

#### **Beneficiaries**

There is no universally accepted definition of the term. However, it has been argued by many stakeholders that traditional cultural expressions are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. In some cases, however, individuals might be regarded as the holders of the traditional cultural expressions and as beneficiaries of protection.<sup>4</sup>

Some national and regional laws for the protection of traditional cultural expressions provide rights directly to concerned peoples and communities. Many rather vest rights in a governmental authority, often providing that proceeds from the granting of rights to use the traditional cultural expressions shall be applied towards educational, sustainable development, national heritage, social welfare or culture related programs.

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<sup>1</sup> WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO, p. 264.

<sup>2</sup> The edition used for this document is the 8<sup>th</sup> edition, by Bryan A. Garner.

<sup>3</sup> Recommendations for African Negotiators from the 2nd Preparatory Meeting of African Indigenous Peoples and Local Communities, UNEP/CBD/COP/10/INF/37, 14 October 2010.

<sup>4</sup> Draft Report of the Seventeenth Session of the Committee (WIPO/GRTKF/IC/17/12 Prov.2)

Article 2 of “The Protection of Traditional Cultural Expressions: Draft Articles” (WIPO/GRTKF/IC/18/4 Rev.) provides that:

*Measures for the protection of traditional cultural expressions shall/should be for the benefit of the:*

*Option 1: Indigenous Peoples, communities<sup>5</sup> and nations, Local Communities and Cultural Communities [and individuals of those communities]*

*Option 2: Peoples and Communities, [for example] including Indigenous Peoples, Communities, Local Communities, Cultural Communities, and/or Nations, and individual groups and families and minorities.*

*[in whom the [custody, and] safeguarding of the traditional cultural expressions are [entrusted or by whom they are held] presumed to be vested] in accordance with:]*

*[Option 1: the relevant national/domestic laws and/or practices*

*Option 2: their laws and/or practices, including customary law and community protocols]*

*[[and] or who maintain, control, use or develop the traditional cultural expressions as being [characteristic or genuine] indicative expressions of their cultural and social identity and cultural heritage. In case a traditional cultural expression is specific to a nation, the authority as determined by the national/domestic law.]*

## **Consultation**

According to Black’s Law Dictionary, consultation is the act of asking the advice or opinion of someone. Consultation refers to the process whereby people exchange views and information. It is not just a one-way process, but a process of sharing knowledge and opinions. Consultation means working together, listening to what the other party has to say and acting upon it.

According to some, consultation and consent in indigenous communities are interrelated. Through consultation, a third party user can come to understand what requires consent and the correct people to whom to give it, and the people giving consent can more fully understand what they are consenting to.<sup>6</sup>

The ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989, states that consultations should be undertaken “in good faith and in a form appropriate to the circumstances, with the objective of achieving the agreement or consent to the proposed measures.” (Article 6(2))

## **Cultural Community**

“Cultural community” has been defined as a tightly knit social unit whose members experience strong feelings of unity and solidarity and which is distinguished from other communities by its own culture or cultural design, or by a variant of the generic culture.<sup>7</sup>

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<sup>5</sup> [Note from the Secretariat: this footnote is part of the draft article] Footnote explaining different layers of communities.

<sup>6</sup> Terri Janke, Pathways & Protocols – A Filmmaker’s guide to Working with Indigenous People, Culture and Concepts, p. 51.

<sup>7</sup> Draft Glossary proposed by a group of Dutch experts convened by the bureau of the Netherlands National Commission for UNESCO, TER/CH/2002/WD/4, 2002.

### **Cultural Diversity**

Cultural diversity refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.<sup>8</sup>

### **Cultural Expressions**

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, defines cultural expressions as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.”<sup>9</sup>

### **Cultural Heritage**

For purposes of the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, 1972, the following is considered as cultural heritage, as outlined in Article 1:

- (a) monuments : architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- (b) groups of buildings : groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science ;
- (c) sites : works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

### **Cultural Identity**

Cultural identity denotes the correspondence which exists between a community—national, ethnic, linguistic, etc.—and its cultural life, as well as the right of each community to its own culture.<sup>10</sup>

The *Robert Dictionnaire de Sociologie* refers to “cultural identity” as the influence of a society or culture on individuals, and also the individuals’ influence on the said society.<sup>11</sup>

The ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989, stipulates that governments should promote the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.<sup>12</sup>

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<sup>8</sup> Art.4(1), UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

<sup>9</sup> Art.4(3), UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

<sup>10</sup> UNESCO Thesaurus, <http://www.vocabularyserver.com/unesco/?tema=2563>.

<sup>11</sup> Le Robert, Dictionnaire de Sociologie. (our translation)

<sup>12</sup> ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989, Art. 2(2)(b).

## **Cultural Property**

Cultural property is defined in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970, as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

## **Custodian**

Black's Law Dictionary defines "custodian" as a "person or institution that has charge or custody (of a child, property, papers, or other valuables)." According to the same source, "custody" refers to the care and control of a thing or person for inspection, preservation, or security. A "custodian" is defined in the Oxford English Dictionary as "one who has the custody of a thing or person; a guardian, keeper." The Merriam-Webster dictionary provides: "one that guards and protects or maintains."

The term "custodian" in the context of traditional cultural expressions refers to those communities, peoples, individuals and other entities which, according to customary laws and other practices, maintain, use and develop the traditional cultural expressions. It expresses a notion that is different from "ownership," since it conveys a sense of responsibility to ensure that the traditional cultural expressions are used in a way that is consistent with community values and customary law.<sup>13</sup>

## **Customary Context**

"Customary context" refers to the utilization of traditional cultural expressions in accordance with the practices of everyday life of the community, such as, for instance, usual ways of selling copies of tangible expressions of folklore by local craftsmen.<sup>14</sup>

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<sup>13</sup> Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge, document WIPO/GRTKF/IC/18/INF/8.

<sup>14</sup> Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982, Part III, para. 42.

### **Customary Law and Protocols**

Black's Law Dictionary defines "customary law" as law "consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws."

Customary law has also been defined as "locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life."<sup>15</sup>

The ways in which customary laws are embodied differ from one another. For instance, the laws can be codified, written or oral, expressly articulated or implemented in traditional practices. Another important element is whether these laws are actually "formally" recognized by and/or linked to the national legal systems of the country in which a community resides. A decisive factor in determining whether certain customs have status as law is whether they are being viewed by the community as having binding effect or whether they simply describe actual practices.

Customary laws concern many aspects of communities' lives. It define rights and responsibilities of community members on important aspects of their life, culture and world view: customary law can relate to use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems, and many other matters.<sup>16</sup>

It has been argued that customary law consists of indigenous customs practiced by traditional communities, and carrying along with them local sanctions for their breach. Most of customary law rules are unwritten and not uniform across ethnic groups. Differences in the customary laws of ethnic groups can be traced to various factors such as language, proximity, origin, history, social structure and economy. Customary law is not static, but dynamic; its rules change from time to time to reflect changing social and economic conditions.<sup>17</sup>

### **Customary Practices**

Customary practices may be described as the acts and uses governing and guiding aspects of a community's life. Customary practices are engrained within the community and embedded in the way it lives and works. They cannot be perceived as stand-alone, codified "laws" as such.<sup>18</sup>

### **Customary Use**

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, defines customary use as "the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners."

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<sup>15</sup> Protection Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May, 2005.

<sup>16</sup> Draft Customary Law and Intellectual Property Issues Paper – version 3.0 (December 2006), [www.wipo.int/tk/en/consultations/customary\\_law/index.html](http://www.wipo.int/tk/en/consultations/customary_law/index.html).

<sup>17</sup> Paul Kuruk, "African Customary Law and the Protection of Folklore", Copyright Bulletin, XXXVI, No.2, 2002, p. 6, quoting, in part, Paris, 15 June 1982, Gazette du Palais, 1982.2, Summary, p. 378, or Paris, 25 April 1978, Gazette du Palais, 1978.2, p. 448.

<sup>18</sup> Customary Law and Intellectual Property Issues Paper, *op.cit.* note 16.

The term “continuing customary use” refers to the persistence and living nature in the use of traditional knowledge and/or traditional cultural expressions by indigenous communities in accordance with their own customary laws and practices.<sup>19</sup>

### **Derivative Work**

In copyright law, the term “derivative works” refers to the translations, adaptations, arrangements and similar alterations of preexisting works which are protected under Article 2(3) of the Berne Convention as such without prejudice to the copyright in the preexisting works.<sup>20</sup> Sometimes, the term is used with a broader meaning, extending to the compilations/collections of works protected under Article 2(5) of the Berne Convention (as well as under Article 10.2 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (the TRIPS Agreement), and Article 5 of the WIPO Copyright Treaty, 1996 (WCT)).<sup>21</sup> In this sense, a “derivative work” includes compilations of data or other material, whether in machine-readable or other form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations.<sup>22</sup> Works of compilation and collection have been protected under the Berne Convention along with other derivative works.<sup>23</sup>

The author’s moral right may limit the right of third parties to make a derivative work. Therefore, even when a person is contractually or statutorily entitled to modify the work or to use it to create a derivative work, the author may object to any distortion of the work that is prejudicial to his or her reputation.

Some jurisdictions have adapted the definition of derivative works in the field of traditional cultural expressions. According to the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, the term refers to any intellectual creation or innovation based upon or derived from traditional knowledge or expressions of culture.<sup>24</sup>

### **Derogatory Action**

The adjective “derogatory” refers to a prejudice to the honor or reputation in line with Article 6*bis* of the Berne Convention. As to the term “action,” it refers to something other than an actual change or interference with the work itself. It is an action “in relation to” the work. The term “derogatory action” was added to the Berne Convention at the Brussels Revision in order to cover uses of the work that were prejudicial to the author. It refers to situations where communication of a work is done in such a manner as to cause the author harm.<sup>25</sup>

### **Disclosure**

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<sup>19</sup> Glossary of Key Terms Related to Intellectual property and Traditional Knowledge, document WIPO/GRTKF/IC/18/INF/8

<sup>20</sup> Art. 2(3) Berne Convention. “Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.”

<sup>21</sup> WIPO Guide, *op.cit.* note 1.

<sup>22</sup> Art.2(5) Berne Convention, Art. 10(2) TRIPS Agreement, Art.6 World Copyright Treaty.

<sup>23</sup> See Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights—The Berne Convention and Beyond*, Oxford, Vol. I., p.485.

<sup>24</sup> Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, Part I. 4.

<sup>25</sup> Sam Ricketson and Jane C. Ginsburg, *op. cit.* note 23, p.603.

According to Black's Law Dictionary, a "disclosure" is a revelation of facts or act or process of making known something that was previously unknown.

In the field of copyright, "disclosure" may mean making a work accessible to the public for the first time. First publication of works is one—but not the only possible—form of disclosure, since works may also be disclosed through non-copy related acts, such as public performance, and broadcasting to the public by cable (wire).<sup>26</sup> Recognition of such a right is not an obligation under international copyright norms. The Berne Convention refers to the use of publicly disclosed works in the context of exceptions.<sup>27</sup> The author has the right to disclose his work to the world.<sup>28</sup> Under certain national laws, the "right of disclosure" is a moral right.

### **Distortion**

According to the Oxford English Dictionary, "distortion" refers to the twisting or perversion of words so as to give to them a different sense; perversion of opinions, facts, history, so as to misapply them. The Berne Convention provides that an author shall have the right to claim authorship of the work and to object to any distortion, in relation to the said work, which would be prejudicial to his honor or reputation.<sup>29</sup>

### **Documentation**

The Oxford English Dictionary defines "documentation" as the accumulation, classification and dissemination of information; the material as collected.

Documenting traditional cultural expressions may include recording them, writing them down, taking pictures of them or filming them—anything that involves recording them in a way that preserves them and could make them available for others. It is different from the traditional ways of preserving and passing on traditional cultural expressions within the community.<sup>30</sup>

### **Equitable Remuneration**

Remuneration of certain acts carried out in respect of a work or an object of related rights in an amount and in a manner consistent with what may be regarded as normal commercial standards in case of authorization of the same act by the owner of a copyright or related rights. Such remuneration is usually payable when economic rights are reduced to a right to remuneration (and, in general, applied on the basis of a non-voluntary license).<sup>31</sup>

The WIPO Performances and Phonograms Treaty, 1996 (WPPT), provides that performers and producers of phonograms enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, for broadcasting or for communication to the public (Article 15(1)). However, any Contracting Party may restrict or—provided that it makes a reservation to the Treaty—deny this right (Article 15(3)).

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<sup>26</sup> WIPO Guide, *op. cit.* note 1, p.282.

<sup>27</sup> Art. 10*bis* and 11. See also Sam Ricketson and Jane C. Ginsburg, *op. cit.* note 23, p.614.

<sup>28</sup> *Ibid.*

<sup>29</sup> Art. 6*bis* (1).

<sup>30</sup> Summary and Introduction to the Toolkit for Managing Intellectual Property when Documenting Traditional Knowledge and Genetic Resources, document WIPO/GRTKF/IC/5/5. This term was also discussed in WIPO/GRTKF/IC/17/INF/9.

<sup>31</sup> WIPO Guide, *op. cit.* note 1.

### **Equitable Sharing of Benefits**

The Convention on Biological Diversity, 1992, prescribes “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” (Article 1).

Benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Annex to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.<sup>32</sup> The steps involved in the process of obtaining access to genetic resources and sharing of benefits may include activities prior to access, research, and development conducted on the genetic resources, as well as their commercialization and other uses, including benefit-sharing.<sup>33</sup>

### **Exceptions**

The term “exceptions” sets the limits of the use of a copyrighted work. Exceptions are closely concerned with the acts that relate to the protected elements. Sometimes the word “exception” covers legislative decisions which remove certain original creations from the owner’s monopoly (the text of laws or judicial decisions, for example) but, on the whole, it is a question of determining what uses of protected elements are neither subject to authorization nor remuneration.<sup>34</sup>

The Berne Convention provides for the application of a three-step test to determine the permissibility of exceptions: (i) the exception may only cover certain special cases; (ii) the exception must not conflict with a normal exploitation of the work and (iii) must not unreasonably prejudice the legitimate interests of the rights of right owners.<sup>35</sup>

### **Expression by Action**

“Expressions by action” refer to expressions of the human body.<sup>36</sup> They can include folk dances, plays and artistic forms of rituals, and need not be reduced to material form, e.g., be written down in choreographic notation.<sup>37</sup>

### **Expressions of Folklore**

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<sup>32</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Art. 5(4).

<sup>33</sup> Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their utilization, para.23.

<sup>34</sup> Exceptions and Limits to Copyright and Neighboring Rights, study prepared by Pierre Sirinelli, WCT-WPPT/IMP/1, 1999, p.2.

<sup>35</sup> Art. 9(2).

<sup>36</sup> Model Provisions, *op. cit.* note 14, para. 37.

<sup>37</sup> *Ibid.*

In the WIPO-UNESCO Model Provisions, 1982, “expressions of folklore” are productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of a country or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) Verbal expressions, such as folk tales, folk poetry and riddles;
- (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.<sup>38</sup>

In the context of the Committee, the terms “traditional cultural expressions” and “expressions of folklore” are synonyms and used alternatively.

### **Fair Practice**

The Berne Convention uses the expression “fair practice” in certain provisions on exceptions to copyright protection (see Article 10(1) concerning quotations, and Article 10(2) on free utilization of works—to the extent justified by the purpose—by way of illustration for teaching). For determining what kind of practice may be regarded as “fair,” the criteria of the three-step test should be taken into account.<sup>39</sup>

### **Family**

A family is a group of persons connected by blood, affinity, or law, especially within two or three generations (Black’s Law Dictionary).

### **Fixation**

Fixation is the process or result of recording a work of authorship in tangible form (Black’s Law Dictionary). Fixation of a work or object of related rights in material form (including storage in an electronic (computer) memory), must be done in a sufficiently stable form, in a way that on this basis the work or object of related rights may be perceived, reproduced or communicated to the public.<sup>40</sup> Fixation in material form is not always a necessary pre-requisite of protectability, but the Berne Convention allows national copyright laws to make fixation such a condition.<sup>41</sup> The fixation of traditional cultural expressions in a material form may establish new intellectual property rights in the fixation and these rights may be used indirectly to protect the traditional cultural expressions themselves—such a strategy has been used to protect ancient rock art.<sup>42</sup> It has been argued that the use of the term “expression” could give the impression of a fixation requirement for protection of traditional cultural expressions.<sup>43</sup>

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<sup>38</sup> Model Provisions, *op. cit.* note 14, Section 2.

<sup>39</sup> WIPO Guide, *op. cit.* note 1, p. 289.

<sup>40</sup> *Ibid.*, p. 290.

<sup>41</sup> Art.2(2).

<sup>42</sup> Terri Janke, “Unauthorized Reproduction of Rock Art”, in *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO, 2003.

<sup>43</sup> Draft Report of the Seventeenth Session of the Committee (WIPO/GRTKF/IC/17/12 Prov.2), para.50.

## Folklore

As defined in the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, “folklore (or traditional and popular culture) is the totality of tradition-based creations, of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

The first attempts to explicitly regulate the use of creations of folklore were made in the framework of several copyright laws (Tunisia, 1967; Bolivia, 1968 (in respect of musical folklore only); Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Mali, 1977; Burundi, 1978; Ivory Coast, 1978; Guinea, 1980; Tunis Model Law on Copyright for Developing Countries, 1976) and in an international Treaty (the Bangui text of 1977 of the Convention concerning the African Intellectual Property Organization, hereinafter referred to as “the OAPI Convention”). All these texts consider works of folklore as part of the cultural heritage of the nation (“traditional heritage,” “cultural patrimony”; in Chile, “cultural public domain” the use of which is subject to payment). The meaning of folklore as covered by those texts *is* understood, however, in different ways. An important copyright-type common element in the definition according to the said laws (except the Tunis Model Law that contains no definition) is that folklore must have been created by authors of unknown identity but presumably being or having been nationals of the country. The OAPI Convention mentions creation by “communities” rather than authors, which delimitates creations of folklore from works protected by conventional copyright. The Tunis Model Law defines folklore using both of these alternatives, and considers it as meaning creations “by authors presumed to be nationals of the country concerned, or by ethnic communities.” According to the Law of Morocco, folklore comprises “all unpublished works of the kind”, whereas the Laws of Algeria and Tunisia do not restrict the scope of folklore to unpublished works. The Law of Senegal explicitly understands the notion of folklore as comprising both literary and artistic works. The OAPI Convention and the Tunis Model Law provide that folklore comprises scientific works too. Most of the statutes in question recognize “works inspired *by* folklore” as a distinct category of works whose use for commercial purposes requires the approval of a competent body.<sup>44</sup>

## Formality

Black’s Law Dictionary defines a formality as a small point of practice that, though seemingly unimportant, must usually be observed to achieve a particular legal result. In the copyright context, the term “formality” refers to a procedural or administrative requirement, such as placing a copyright notice, depositing copies or registration, to be fulfilled as condition for the acquisition, enjoyment and exercise (including the enforceability) of copyright or related rights.<sup>45</sup>

Under the Berne Convention, TRIPS Agreement, WCT and the WPPT, the enjoyment and exercise of the rights may not be subject to any formality.<sup>46</sup>

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<sup>44</sup> Model Provisions, *op. cit.* note 14, Part I, para. 5-7.

<sup>45</sup> WIPO Guide, *op. cit.* note 1, p.290.

<sup>46</sup> Art. 5(2) Berne Convention, Art. 9(1) TRIPS Agreement, Art. 25(10) WIPO Copyright Treaty and Art. 20 WIPO Performances and Phonograms Treaty. See WIPO Guide *op. cit.* note 1, p.291.

## **Group**

According to the Oxford English Dictionary, a group constitutes an assemblage of persons, animals, or material things, standing near together, so as to form a collective unity; a knot (of people), a cluster (of things). The *Dictionnaire Robert de Sociologie* refers to “group” as an: *ensemble, large ou restreint, de personnes ayant des traits communs (opinions, goûts, activités)*. A group differs in this sense from an individual’s social identity.

## **Heritage (of Indigenous Peoples)**

The “heritage of indigenous peoples” (and other peoples) or “indigenous cultural heritage” refers broadly to the items described in the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, 2000, elaborated by the Chairperson-Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mrs. Erica-Irene Daes. Paragraphs 12, 13 and 14 of the Guidelines provide definitions.

Paragraph 12 states that:

The heritage of indigenous peoples has a collective character and is comprised of all objects, sites and knowledge including languages, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people which may be created or rediscovered in the future based upon their heritage.

Paragraph 13 is to the effect that:

The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic creation such as music, dance, song, ceremonies, symbols and designs, narratives and poetry and all forms of documentation of and by indigenous peoples; all kinds of scientific, agricultural, technical, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge, cultigens, remedies, medicines and the use of flora and fauna; human remains; immoveable cultural property such as sacred sites of cultural, natural and historical significance and burials.

Paragraph 14 stipulates that:

Every element of an indigenous peoples’ heritage has owners, which may be the whole people, a particular family or clan, an association or community, or individuals, who have been specially taught or initiated to be such custodians. The owners of heritage must be determined in accordance with indigenous peoples’ own customs, laws and practices.

For the purposes of these Guidelines, “indigenous cultural heritage” means both tangible and intangible creations, manifestations and production consisting of characteristic elements of the culture of an indigenous people, and developed and maintained by that people, or by indigenous individuals if the creation reflects the traditional literary, artistic or scientific expressions of the people. Such creations, manifestations and productions include the practices, representations, expressions – as well as the instruments, objects, artefacts, sites and cultural spaces associated therewith – that indigenous peoples and individuals recognize as part of their cultural heritage. It further includes the knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, as well as knowledge that is embodied in the traditional lifestyle of an indigenous people, or is contained in codified knowledge systems passed between generations. Cultural heritage, transmitted from generation to generation, is constantly recreated

by indigenous peoples in response to changes in their environment and their interaction with nature and their history, and provides them with a sense of identity and continuity.<sup>47</sup>

### **Incidental Use**

According to Black's Law Dictionary, the term "incidental" refers to the subordination to something of greater importance, a use incident, dependent, subordinate, or consequential part of something else.

One form of defense for copyright infringement provided, for example, by section 31 (1) of the United Kingdom Copyright Designs and Patents Act 1988 is that of incidental use. An incidental use is when a piece of copyright protected work is included in another piece of work but where the inclusion is incidental and appears only in the background. Incidental use constitutes a defense which prevents action being taken against the person creating the new works. Under Czech copyright legislation, copyright is not infringed by anybody who uses a work incidentally, in connection with an intended primary use of another work or element.<sup>48</sup>

### **Indigenous and Local Communities**

The term "indigenous and local communities" has been the subject of considerable discussion and study. There is no universal, standard definition of "indigenous and local communities."

The term "indigenous and local communities" is used in the Convention on Biological Diversity. For instance, Article 8(j) states that "[e]ach Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; ...". The Convention on Biological Diversity uses the term "indigenous and local communities" in recognition of communities that have a long association with the lands and waters that they have traditionally live on or used.<sup>49</sup>

The same term is used in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

This term is also used in the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. Article 5.1(d) states that "[e]ach Contracting Party ... shall in particular, as appropriate: ... (d) Promote in situ conservation of wild crop relatives and wild plants for food production, including in protected areas, by supporting, inter alia, the efforts of indigenous and local communities...", while Article 5.1(c) states that "[e]ach Contracting Party ... shall in particular, as appropriate: ... (c) Promote or support, as appropriate, farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources for food and

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<sup>47</sup>Standard-Setting: Future Priorities for Standard-Setting Activities, Review of the draft principles and guidelines on the heritage of indigenous peoples, Working paper submitted by Yozo Yokota and the Saami Council, E/CN.4/Sub.2/AC.4/2006/5, 16 June 2006.

<sup>48</sup> Art.38c Czech Republic Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (The Copyright Act), as Amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.

<sup>49</sup> "The Concept of Local Communities", Background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues for the Expert Workshop on the Dissaggregation of Data (PFII/2004/WS.1/3/Add.1). See also UNEP/CBD/WS-CB/LAC/1/INF/5.

*agriculture...". Article 9.1 states that "[t]he Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world...".*

Other legal instruments use different terms:

"Local or traditional community" is used in the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. Article 2.1 states that "'community', where the context so permits, includes a local or traditional community."

Article 1 of the Decision 391 on Access to Genetic Resources of Andean Community defines "native, Afro-American or local community" as "a human group whose social, cultural and economic conditions distinguish it from other sectors of the national community, that is governed totally or partially by its own customs or traditions or by special legislation and that, irrespective of its legal status, conserves its own social, economic, cultural and political institutions or a part of them."

Article 7.III of the Brazilian Provisional Act No. 2,186-16, dated August 23, 2001, defines "local community" as a "human group, including descendants of Quilombo communities, differentiated by its cultural conditions, which is, traditionally, organized along successive generations and with its own customs, and preserves its social and economic institutions."

### **Indigenous Knowledge**

"Indigenous knowledge" is "knowledge held and used by communities, peoples and nations that are 'indigenous'".<sup>50</sup> In this sense, "indigenous knowledge" would be the traditional knowledge of indigenous peoples. Indigenous knowledge is, therefore, a part of the traditional knowledge category, but traditional knowledge is not necessarily indigenous.<sup>51</sup>

### **Indigenous Peoples**

The term "indigenous peoples" has been the subject of considerable discussion and study. There is no universal, standard definition of "indigenous peoples".

The United Nations Declaration on the Rights of Indigenous Peoples acknowledges the equal human rights of indigenous peoples against cultural discrimination and seeks to promote mutual respect and harmonious relations between the indigenous peoples and States. However, there is no definition of "indigenous peoples".

The description of the concept of "indigenous" in the Study of the Problem of Discrimination Against Indigenous Populations, prepared by Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. J. Martínez Cobo, is regarded as an acceptable working definition by many indigenous peoples and their representative organizations. The Study understands indigenous communities, peoples and nations as "those which, having a historical continuity with 'pre-invasion' and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems."

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<sup>50</sup> WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) "Intellectual Property Needs and Expectations of Traditional Knowledge", p. 23-24.

<sup>51</sup> *Ibid.*, p.23. See also List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), para. 41 of Annex.

The UNEP Glossary of Biodiversity Terms defines “indigenous people” as “*people whose ancestors inhabited a place or country when persons from another culture or ethnic background arrived on the scene and dominated them through conquest, settlement, or other means and who today live more in conformity with their own social, economic, and cultural customs and traditions than with those of the country of which they now form a part. (Also: ‘native peoples’ or ‘tribal peoples.’)*”<sup>52</sup>

The World Bank uses the term “indigenous peoples” in a generic sense to refer to distinct groups with the following characteristics in varying degrees:

- (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (ii) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- (iii) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (iv) an indigenous language, often different from the official language of the country or region.<sup>53</sup>

The Indigenous Department, International Labour Organization, refers to indigenous peoples as:

- Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>54</sup>

Elements include:

- historical continuity, i.e., they are pre-conquest/colonization societies;
- territorial connection (their ancestors inhabited the country or region);
- distinct social, economic, cultural and political institutions (they retain some or all of their own institutions).<sup>55</sup>

“Aboriginal people” is a related term. The Oxford Dictionary defines “aboriginal” as (1) “[...] of peoples, plants, and animals: inhabiting or existing in a land from earliest times; strictly native, indigenous”; (2) “[...] inhabiting or occupying a country before the arrival of European colonists and those whom they introduced”; and (3) “[...] of, relating to, or characteristic of the Aborigines of Australia or their languages”.

Section 35 of the Constitution of Canada states that “[...] Aboriginal Peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.” The 1996 Canadian Royal Commission on

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<sup>52</sup> UNEP Glossary of Biodiversity Terms, available at <http://www.unep-wcmc.org/reception/glossaryF-L.htm>.

<sup>53</sup> See Operational Policy 4.10 on Indigenous Peoples, World Bank 2005; John Henriksen: Key Principles in Implementing ILO Convention No. 169, 2008.

<sup>54</sup> Article 1, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Indigenous peoples also stress that there is a degree of self-definition in determining what makes up a specific indigenous or tribal people.

<sup>55</sup> Indigenous and Tribal Peoples’ Rights In Practice—A Guide to ILO Convention No. 169, p.9.

Aboriginal People self-defined their focus group as: "... *organic political and cultural entities that stem historically from the original peoples of North America* [...]."

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>56</sup>

### **Infringement**

According to Black's Law Dictionary, an infringement is an act that interferes with one of the exclusive rights of an IP right owner. Specifically, in the field of copyright and related rights, infringement is an act carried out in respect of a work protected by copyright or an object of related rights without authorization of the owner of the copyright or related rights concerned where such authorization is required. The liability for infringement may exist not only on the basis of direct liability (for the performance of the unauthorized act in itself), but also on the basis of "contributory liability" or "vicarious liability".<sup>57</sup>

Under Australian law, for example, it is an infringement to directly copy a substantial part of an artistic work. A substantial part does not necessarily refer to a large part of the work; a range of issues, which includes the quality of the part copied, are relevant.<sup>58</sup>

### **Intangible Cultural Heritage**

According to Black's law dictionary, "intangible" refers to something that lacks a physical form. "Tangible" on the other hand is defined as "having or possessing physical form; corporeal; capable of being touched and seen; perceptible."

"Intangible cultural heritage" is defined in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development."

The Convention also states that "intangible cultural heritage" is manifested *inter alia* in the following domains: a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; b) performing arts; c) social practices, rituals and festive events; d) knowledge and practices concerning nature and the universe; e) traditional craftsmanship.

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<sup>56</sup> United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and its Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 para 379 (1986).

<sup>57</sup> WIPO Guide, *op. cit.* note 1, p. 293.

<sup>58</sup> See Terry Janke, "*Bulun Bulun & Anor v R & T Textiles Pty Ltd*", in *Minding Culture*, *op. cit.* note 42, p. 50.

## Integrity

The right of integrity is the right to prevent unauthorized alterations and changes to works.<sup>59</sup> After the 1949 Brussels Revision of the Berne Convention, the prohibition of other derogatory actions in relation to the said work which would be prejudicial to the author's honor or reputation was added.<sup>60</sup>

## Limitations

"Limitation," according to Black's Law Dictionary, refers to the act of limiting; the state of being limited, a restriction. The word "limits," in addition to "exceptions," refers to "boundaries" or "restrictions".<sup>61</sup> In order to maintain an appropriate balance between the interests of rights holders and users of protected works, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorization of the right holder and with or without payment of compensation.<sup>62</sup>

The Berne Convention sets conditions under which authors' rights could be limited, and free uses therefore permitted.<sup>63</sup> A three-step-test has been devised to determine the conditions under which an act of limitation may be carried out.<sup>64</sup> This test has been extended to Article 13 of the TRIPS Agreement, Article 10 of the WCT, as a test for exceptions and limitations on all economic rights under copyright. Article 16 of the WPPT extends it to rights of performers and producers of phonograms covered by that treaty.<sup>65</sup>

## Local Community

In relation to the Convention on Biological Diversity 1992), "local communities" may be defined as "the human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihood and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisherfolk, pastoralists, forest dwellers and others."<sup>66</sup>

## Minority

According to Black's Law Dictionary, "minority" refers to a group that is different in some respect from the majority and that is sometimes treated differently as a result.

A minority is a group which is numerically inferior to the rest of the population of a State and in a non dominant position, whose members possess ethnic, religious or linguistic characteristics

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<sup>59</sup> Ricketson and Ginsburg. *Op.cit.* note 23, p.602

<sup>60</sup> Art.6 *bis* Berne Convention.

<sup>61</sup> "Exceptions and Limits to Copyright and Neighboring Rights", WCT-WPPT/IMP/1, p.2.

<sup>62</sup> WIPO Copyright and Related Rights website, <http://www.wipo.int/copyright/en/limitations/index.html>.

<sup>63</sup> Art.10(1).

<sup>64</sup> Art.9(2).

<sup>65</sup> WIPO Guide, *op. cit.* note 1, p. 313.

<sup>66</sup> See UNEP-CBD Sui generis workshop, UNEP/CBD/WG8J/4/INF/18, p.2.

which differ from those of the rest of the population, and who if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language.<sup>67</sup>

According to the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, minorities have the right to enjoy their own culture, without interference or any form of discrimination.<sup>68</sup> States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.<sup>69</sup>

According to the International Covenant on Civil and Political Rights, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>70</sup>

### **Misappropriation**

Black's Law Dictionary defines "misappropriation" as "the common-law tort of using the noncopyrightable information or ideas that an organization collects and disseminates for a profit to compete unfairly against that organization, or copying a work whose creator has not yet claimed or been granted exclusive rights in the work. [...] The elements of misappropriation are: (1) the plaintiff must have invested time, money, or effort to extract the information, (2) the defendant must have taken the information with no similar investment, and (3) the plaintiff must have suffered a competitive injury because of the taking."

The tort of misappropriation is part of unfair competition law in the common law system. Misappropriation thus entails the wrongful or dishonest use or borrowing of someone's property, and is often used to found action in cases where no property right as such has been infringed. Misappropriation may refer to wrongful borrowing or to the fraudulent appropriation of funds or property entrusted to someone's care but actually owned by someone else.

Article 3 of draft Legal Framework for the Protection of Traditional Knowledge in Sri Lanka, 2009, defines "misappropriation" as "(i) acquisition, appropriation or use of traditional knowledge in violation of the provisions of this Act, (ii) deriving benefits from acquisition, appropriation or use of traditional knowledge where the person who acquires, appropriates or uses traditional knowledge is aware of or could not have been unaware of or is negligent to become aware of the fact that the traditional knowledge was acquired, appropriated or used by any unfair means and (iii) any commercial activity contrary to honest practices that results in unfair or inequitable benefits from traditional knowledge."<sup>71</sup>

Article 3(1) of "The Protection of Traditional Knowledge: Revised Objectives and Principles" (WIPO/GRTKF/IC/18/5 Prov.) defines "acts of misappropriation." By contrast, the draft articles for the protection of traditional cultural expressions provide for an exclusive property right, or right of "free prior and informed consent," in certain cases. This right would give indigenous peoples and

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<sup>67</sup> Francesco Capotorti, Former Special Rapporteur of the United Nations, 1979, cited by Dieter Kugelmann, *The Protection of Minorities and Indigenous Peoples Respective Cultural Diversity*, A. Von Bogdandy and R. Wolfrum, (eds), Max Planck Year Book of United Nations Law, Vol. 11, 2007, p.237.

<sup>68</sup> Art.2 (1) Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly Resolution 47/135 of December 1992.

<sup>69</sup> *Ibid.* Art.1(1).

<sup>70</sup> Art. 27 *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 23 March 1976.

<sup>71</sup> "A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka", Working Document-Version 01- January 2009.

local communities authority to prevent any act of misuse and misappropriation described in the article, which include the reproduction, publication, adaptation, and modification of traditional cultural expressions and acquisition and exercise of intellectual property rights over the traditional cultural expressions. The right would also empower communities to authorize third parties to use their traditional cultural expressions on specific agreed terms that also include benefit-sharing. The legal nature of the protection is thus not based on the misappropriation doctrine in the strict sense of the term, but provides generally for protection against the misappropriation of traditional cultural expressions, through, *inter alia*, a property right.

### **Misuse**

Dictionaries define misuse as a wrong, incorrect or improper use, or misapplication. Misuse may also refer to improper or excessive use, or to acts which change the inherent purpose or function of something. Black's Law Dictionary states: improper use, in an unintended or unforeseeable manner.

### **Modification**

A modification is a change to something (Black's Law Dictionary). It is a synonym of alteration. Article 6*bis* of the Berne Convention, provides, *inter alia*, for a right of the author to object to any distortion, mutilation or other modification of his work which would be prejudicial to his honor or reputation.

### **Musical expression**

Musical expressions are expressions by musical sounds.<sup>72</sup> They can include folk songs (rhythms) and instrumental music, and the sounds which are the expression of rituals.<sup>73</sup>

### **Mutilation**

"Mutilation" refers to the act of cutting out or excising a part of a thing, especially a book or other document; to change or destroy part of the content or meaning, according to the Oxford English Dictionary.

The protection against mutilation is one attribute of the author's moral rights, according to Article 6*bis* of the Berne Convention.

### **Mutual Respect**

The United Nations Declaration on the Rights of Indigenous Peoples, in its preamble, considers mutual respect as a standard of achievement to be pursued in a spirit of partnership.<sup>74</sup>

In addition, "respect" can refer to:

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<sup>72</sup> Sect. 2, Model Provisions, *op. cit.* note 14.

<sup>73</sup> Art 1(b), The Protection of Traditional Cultural Expressions: Draft Articles, WIPO/GRTKF/IC/18/4.

<sup>74</sup> Resolution adopted by the General Assembly, 107<sup>th</sup> plenary meeting, 13 September 2007.

- Respect for the cultural or economic interests of the communities in which they originate with concession of a share in the returns from exploitations of folklore to the peoples who are the authors of their folklore.<sup>75</sup>
- Respect for Indigenous individuals and communities, and respect for indigenous culture and heritage.<sup>76</sup>

“Mutual” relates to two or more people, having the same feelings for each other; standing in reciprocal relation to one another (Oxford English Dictionary).

### **Nation**

Black’s Law Dictionary defines “nation” as a large group of people having a common origin, language, and tradition and usually constituting a political entity. “Nationals” refers to persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in a customs territory.<sup>77</sup>

The term “nation” carries connotations of a community shaped by common descent, culture and history and often by a common language as well.<sup>78</sup>

The term “cultural communities” is intended to be broad enough to include the nationals of an entire country, a “nation”, in cases where traditional cultural expressions are regarded as “national folklore” and belonging to all of the people of a particular country. This complements and accords with the practice in other policy areas.<sup>79</sup>

### **Negligent**

According to Black’s Law Dictionary, the term “negligent” characterizes a person’s failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances.

### **Offensive**

“Offensive” refers to the causing of displeasure, anger or resentment; repugnant to the prevailing sense of what is decent or moral (Black’s Law Dictionary).

### **Preservation**

Preservation has two broad elements – first, the preservation of the living cultural and social context of traditional cultural expressions, so that the customary framework for developing, passing on and governing access to traditional cultural expressions is maintained; and second, the preservation of traditional cultural expressions in a fixed form, such as when they are documented. Preservation may have the goal of assisting the survival of the traditional cultural

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<sup>75</sup> Model Provisions, *op. cit.* note 14, p.3.

<sup>76</sup> Terri Janke, *Pathways & Protocols*, *op. cit.* note 689, p. 11.

<sup>77</sup> Daniel Gervais, *The TRIPS Agreement. Drafting and Analysis*, 3<sup>rd</sup> Edition, Sweet & Maxwell, p. 161.

<sup>78</sup> Dieter Kugelmann, *The Protection of Minorities and Indigenous Peoples Respective Cultural Diversity*, A. Von Bogdandy and R. Wolfrum, (eds), *Max Planck Year Book of United Nations Law*, Vol. 11, 2007, p.235.

<sup>79</sup> Glossary on Intangible Cultural Heritage, Netherlands National Commission for UNESCO, 2002 (“... A nation can be a cultural community”), as quoted in “The Protection of Traditional Cultural Expressions/Expressions Of Folklore: Revised Objectives and Principles”, WIPO/GRTKF/IC/17/4.

expressions for future generations of the original community and ensuring their continuity within an essentially traditional or customary framework, or the goal of making them available to a wider public (including scholars and researchers), in recognition of their importance as part of the collective cultural heritage of humanity.<sup>80</sup>

Non-IP laws and programs dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with IP protection. Other international legal systems, such as the Convention on Biological Diversity and UNESCO deal with aspects of conservation, preservation and safeguarding traditional knowledge within their specific policy contexts.<sup>81</sup>

### **Prior Informed Consent**

A right or principle of “prior and informed consent” (PIC) or sometimes “free, prior informed consent” (FPIC) is referred to or implied in several international instruments, particularly in the environmental field, such as Article 6(4) of the Basel Convention on the Transboundary Movement of Hazardous Wastes, 1989, and the Convention on Biological Diversity, 1992.

In respect to access to genetic resources, the Convention on Biological Diversity states in Article 15(5) that it “*shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.*”

Article 16(1) of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity provides that “[*e]ach Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.*”

The notion was originally derived from medical ethics in which a patient has the right to decide whether or not to undergo a medical treatment after being fully informed about the risks and benefits of that particular treatment. For instance, the Universal Declaration on the Human Genome and Human Rights of 1997 states in Article 5 that in all cases of research, treatment or diagnosis affecting an individual’s genome the potential risks and benefits should be assessed and “the prior, free and informed consent of the person concerned shall be obtained”. Article 6 of the UNESCO Declaration on Bioethics and Human Rights of 2005 requires the “prior, free and informed consent of the person concerned” when it comes to “preventive, diagnostic and therapeutic medical intervention” or “scientific research.”

The term flows from the implementation of the general principle of participation of indigenous peoples in decision-making, involvement in the formulation, implementation and evaluation of programs affecting them.<sup>82</sup>

The purpose of the use of the adjective “free” is to ensure that no coercion or manipulation is used in the course of negotiations, while inclusion of “prior” acknowledges the importance of allowing time to indigenous to fully review proposals respecting the time required for achieving

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<sup>80</sup> Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12), para. 37.

<sup>81</sup> The Protection of Traditional Knowledge: Draft Gap Analysis: Revision, WIPO/GRTKF/IC/13/5(b) Rev. Annex I, page 6.

<sup>82</sup> Art.32(2), United Nations Declaration on the Rights of Indigenous Peoples; See also United Nations Development Group, Guidelines Related to Indigenous Peoples.

consensus. It also anticipates the reality that decisions, especially those relating to major investments in development, are often taken in advance with indigenous people. The notion of “informed” consent reflects the growing acceptance that environment and social impact assessment are a pre-requisite for any negotiation process and allow all parties to make balanced decisions.<sup>83</sup>

“Consent” is a process whereby permission is given, based on a relationship or trust. An informed consent implies that clear explanations are provided, along with contract details, possible benefits, impacts and future uses... The process should be transparent, and the language fully understood by indigenous peoples.<sup>84</sup>

## **Protection**

“Protection” in the work of the Committee has tended to refer to protection of traditional cultural expressions against some form of unauthorized use by third parties.<sup>85</sup> Two forms of protection have been developed and applied.

### Positive Protection

Two aspects of positive protection of traditional cultural expressions by intellectual property rights are explored, one concerned with preventing unauthorized use and the other concerned with active exploitation of the traditional cultural expressions by the originating community itself. Besides, the use of non-intellectual property approaches for the positive protection of traditional cultural expressions can be complementary and used in conjunction with intellectual property protection.<sup>86</sup> For instance, positive protection of traditional cultural expressions may prevent others from gaining illegitimate access to traditional cultural expressions or using them for commercial gain without equitably sharing the benefits, but it may also be used by traditional cultural expressions holders to build up their own enterprises based on their traditional cultural expressions.<sup>87</sup>

### Defensive Protection

Defensive protection refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded intellectual property rights over traditional cultural expressions.<sup>88</sup>

## **Protocol**

Protocols are ways of communication and working with others. They provide a framework that can be adapted and applied to specific situations. Protocols are not in themselves legally binding,

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<sup>83</sup> Stephen Allen and Alexandra Xanthaki, “Reflections on the UN Declaration on the Rights of Indigenous Peoples”, Oxford and Portland, Oregon, p.49. See also “United Nations Economic and Social Council Permanent Forum on Indigenous Issues”, Fourth Session, and “Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples”, E/C.19/2005/3. p.8.

<sup>84</sup> Terri Janke, *Pathways & Protocols*, *op. cit.* note 6, p. 51.

<sup>85</sup> Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12), para. 20.

<sup>86</sup> *Id.*, paras. 21 and 22.

<sup>87</sup> *Id.*, para. 21.

<sup>88</sup> *Id.*, para. 28.

but over time, they establish practices that can be relied on as standards. Indigenous cultures place importance on the observation of cultural protocols.<sup>89</sup>

### **Public Domain**

In general, a work is considered to be in the public domain if there is no legal restriction for its use by the public.<sup>90</sup>

Black's Law Dictionary defines the public domain as "[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement."

The public domain has been defined in the field of copyright and related rights as "the scope of those works and objects of related rights that can be used and exploited by everyone without authorization, and without the obligation to pay remuneration to the owners of copyright and related rights concerned – as a rule because of the expiry of their term of protection, or due to the absence of an international treaty ensuring protection for them in the given country".<sup>91</sup>

The role, contours and boundaries of the "public domain" are under active discussion in several forums, including in WIPO and this Committee. Document WIPO/GRTKF/IC/7/INF/8 discusses further the meanings of the "public domain" in relation to traditional cultural expressions.<sup>92</sup>

### **Reputation**

Reputation, according to Black's Law Dictionary, refers to the esteem in which a person is held by others. Reputation appears under the umbrella of author's moral rights protection.<sup>93</sup> At the Brussels Revision Conference of the Berne Convention, preference was given to "honor" and "reputation," found to be more objective concepts reflecting personal interests of the author, as opposed to "moral" or "spiritual interests," which are wider concepts.<sup>94</sup> In the eventuality of harm, there is a difference between harm to the reputation and harm to the author's moral or spiritual interests. It is not enough that the author does not like what was done to her work; the action taken must also reflect badly on her in the public eye.<sup>95</sup>

### **Safeguarding**

The Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, describes safeguarding measures as: "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection,

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<sup>89</sup> Terri Janke, *op.cit.* note 6, p. 10.

<sup>90</sup> See document SCP/13/5.

<sup>91</sup> WIPO Guide, *op. cit.* note 1.

<sup>92</sup> See document WIPO/GRTKF/IC/17/INF/8 "Note on Meanings of the Term 'Public Domain' in the Intellectual Property System, with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore."

<sup>93</sup> Art.6*bis* of the Berne Convention.

<sup>94</sup> Ricketson and Ginsburg, *op. cit.* note 23, p. 606.

<sup>95</sup> *Ibid.*

promotion, enhancement, transmission, particularly through formal and non formal education, as well as the revitalization of the various aspects of such heritage.”

Safeguarding refers to the adoption of precautionary measures to shield certain cultural practices and ideas which are considered of value.<sup>96</sup>

### **Secret**

Something “secret” is something that is kept from the knowledge of others or shared only with those concerned (Black’s Law Dictionary). “Sacred-secret” traditional cultural expressions have a secret or sacred significance according to the customary law and practices of their traditional owners.<sup>97</sup>

### **Social Heritage**

“Social heritage” relates to the sharing out and transmission of goods at the society level.<sup>98</sup>

### **Social Identity**

“Social identity” refers to an individual recognition through society, and the fact that others recognize the individual through the same society.<sup>99</sup>

### **Sui Generis**

Black’s Law Dictionary defines “*sui generis*” as “[Latin “of its own kind”] Of its own kind or class; unique or peculiar. The term is used in intellectual-property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a *sui generis* statute designed for that purpose.”

A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. There are already several examples of *sui generis* intellectual property rights such as plant breeders’ rights - as reflected in the International Convention on the Protection of New Varieties of Plants, 1991 (“the UPOV Convention”) - and the intellectual property protection of integrated circuits - as reflected in the Treaty on Intellectual Property in respect of Integrated Circuits, 1989 (“The Washington Treaty”), among others. The Peruvian Law No. 27811 of 24 July, 2002, Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources is a *sui generis* regime for the protection of collective knowledge of indigenous peoples that is connected with biological resources.

“The Protection of Traditional Cultural Expressions: Draft Articles” (WIPO/GRTKF/IC/18/4 Rev.) embody *sui generis* approaches.

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<sup>96</sup> Draft Glossary, National Commission for UNESCO, *op. cit.* note 7.

<sup>97</sup> Pacific Regional Framework, *op. cit.* note 24, Part I (4).

<sup>98</sup> Le Robert, Dictionnaire de Sociologie, p. 253-254. (our translation).

<sup>99</sup> *Ibid.*, p. 263. (our translation)

## **Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore**

A protocol was adopted by member states of the African Regional Intellectual Property Organization (ARIPO) in August 2010 during the Diplomatic Conference held in Swakopmund, Namibia. According to Article 1.1, this Protocol aims: “(a) to protect traditional knowledge holders against any infringement of their rights as recognized by this Protocol; and (b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context”. The Protocol will enter into force when six Member States of the ARIPO either deposit instruments of ratification or instruments of accession.

### **Tangible Expressions**

“Tangible” refers to an expression capable of being touched and seen; perceptible to the touch; capable of being possessed or realized. It is opposed to “intangible” which refers to something that lacks a physical form, not capable of being touched; impalpable (Black’s Law Dictionary).

Tangible expressions are expressions incorporated in a material object.<sup>100</sup> They are not necessarily reduced to a material form, but must be incorporated in a permanent material, such as stone, wood, textile, gold, etc. Tangible expressions qualify as protected expressions of folklore. Examples of constitutive elements of tangible expressions are:

- (a) Productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
- (b) Musical instruments;
- (c) Architectural forms.<sup>101</sup>

### **Tradition-Based Creations and Innovations**

Traditions are a set of cultural practices and ideas, which are considered to belong to the past and which are designated a certain status.<sup>102</sup> Tradition-based innovation refers the case where tradition is a source of innovation by members of the relevant cultural community or outsiders, and can also identify others uses of tradition relevant to an IP analysis.<sup>103</sup> The term “tradition-based” refers to knowledge systems, creations, innovations and cultural expressions that: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and, are constantly evolving in response to a changing environment.<sup>104</sup>

### **Traditional Context**

“Traditional” means that the traditional cultural expressions are developed according to the rules, protocols and customs of a certain community, and not that they are old. In other words, the adjective “traditional” qualifies the method of creating traditional cultural expressions and not the

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<sup>100</sup> Model Provisions, *op. cit.* note 14, Part III. 37.

<sup>101</sup> Model Provisions, *op. cit.* note 14, Sect.2(iv).

<sup>102</sup> Draft Glossary, National Commission for UNESCO, *op. cit.* note 7.

<sup>103</sup> Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, para. 57

<sup>104</sup> Gervais, *op. cit.* note 77, p. 132.

expressions themselves.<sup>105</sup> The term “traditional” means that the cultural expressions derive from or are based upon tradition, identify or are associated with an indigenous or traditional people, and may be practiced in traditional ways.<sup>106</sup>

“Traditional context” refers to the way of using an expression of folklore in its proper artistic framework based on continuous usage by the community. An example could be the use of a ritual dance in its traditional context, as referring to the performance of the said dance in the actual framework of the rite.<sup>107</sup>

### Traditional Cultural Expressions

WIPO uses the terms “traditional cultural expressions” and “expressions of folklore” to refer to tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms.

The terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “traditional cultural expressions,” often in its abbreviated forms TCEs. The use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

Current discussions within the WIPO IGC rely on the following description of “traditional cultural expressions”:

1. “Traditional cultural expressions”<sup>108</sup> are 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], / tangible or intangible forms of creativity of the beneficiaries, as defined in Article 2 including, but not limited to:
  - (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];
  - (b) [musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals;
  - (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and [traditional]] games, puppet performances, and other performances, whether fixed or unfixed;
  - (d) tangible expressions, such as material expressions of art, [handicrafts,] [works of mas,] [architecture,] and tangible [spiritual forms], and sacred places.

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<sup>105</sup> Nino Pires de Carvalho, *From the Shaman’s Hut to the Patent Office: A Road Under Construction, Biodiversity and the Law*, p. 244

<sup>106</sup> Consolidated Analysis, *op cit.* note 103, para. 53

<sup>107</sup> Model Provisions, *op. cit.* note 14, Part III. 42.

<sup>108</sup> [Note from the Secretariat: this footnote is part of the draft article] “Traditional cultural expressions” and “expressions of folklore” are synonymous for the purposes of this text.

2. Protection [shall] should extend to any traditional cultural expression which is the [unique] / indicative / characteristic product of a people or community, including an indigenous people or local community and cultural communities or nations as defined in Article 2, and [belongs to] is used and developed by that people or community [as part of their cultural or social identity or heritage]. Protected traditional cultural expressions shall be:
  - (a) the products of [creative intellectual activity,] including communal creativity;
  - (b) indicative of [authenticity/being genuine] of the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and
  - (c) maintained, used or developed by nations, states, indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law / customary normative systems or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community.
3. The specific choice of terms to denote the protected subject matter should be determined at the national, regional, and sub-regional levels.<sup>109</sup>

### **Traditional Cultures**

According to Black's Law Dictionary, traditions refer to past customs and usages that influence or govern present acts or practices. IP laws draw a distinction between traditional culture (which may be referred to as traditional culture or folklore *stricto sensu*) and, modern, evolving cultural expressions created by current generations of society and based upon or derived from pre-existing traditional culture or folklore.<sup>110</sup>

### **Traditional Knowledge (TK)<sup>111</sup>**

In the context of the Committee, "traditional knowledge" is used in a narrow sense (traditional knowledge *stricto sensu*) to refer to knowledge as such, in particular the "content or substance of knowledge resulting from intellectual activity in a traditional context, [including] the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources."<sup>112</sup> The scope of traditional knowledge that would be eligible for legal protection has been further defined as traditional knowledge which is:

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<sup>109</sup> Art.1, The Protection of Traditional Cultural Expressions: Draft Articles (WIPO/GRTKF/IC/18/4 Rev.).

<sup>110</sup> Consolidated Analysis, *op. cit.* note 103, para. 54

<sup>111</sup> "Traditional knowledge," as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*). In other words, traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.

<sup>112</sup> Art.1 (1) and 1(2) of The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/18/5 Prov.).

- “(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 or people 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.”

### **Transmission**

According to Black’s Law Dictionary, the term “transmission” refers to the passing of an inheritance to an heir. In the case of traditional cultural expressions, it differs from cultural or social inheritance. Traditional cultural expressions are a heritage that generations appropriate or abandon,<sup>113</sup> without an obligation to maintain. Transmission refers to a static state of art. To “maintain” implies to hold, keep, defend (a place, position, or possession) against hostility or attack, actual or threatened (Oxford English Dictionary).

### **Transparency**

Transparency is the openness; clarity; lack of guile and attempts to hide damaging information (Black’s Law Dictionary).

### **UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property**

The Convention was adopted by UNESCO in 1970 to protect the cultural property existing within the territories of States against the dangers of theft, clandestine excavation, and illicit export. It entered into force in 1972.

The Convention requires its States Parties to take action in three main fields:

- 1- Preventive measures: inventories, export certificates, monitoring trade, imposition of penal or administrative sanctions, educational campaigns, etc.
- 2- Restitution provisions: Per Article 7 (b) (ii) of the Convention, States Parties undertake, at the request of the State Party “of origin,” to take appropriate steps to recover and return any such cultural property imported after the entry into force of the Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. More indirectly and subject to domestic legislation, Article 13 of the Convention also provides provisions on restitution and cooperation.
- 3- International cooperation framework: The idea of strengthening cooperation among and between States Parties is present throughout the Convention. In cases where cultural patrimony is in jeopardy from pillage, Article 9 provides a possibility for more specific undertakings such as a call for import and export controls.

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<sup>113</sup> Le Robert, Dictionnaire de Sociologie, p. 254 (our translation).

### **UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions**

The UNESCO Convention on Cultural Diversity is an international convention adopted by UNESCO in 2005. It entered into force on March 18, 2007.

The Convention has several objectives set out in Article 1, namely (a) to protect and promote the diversity of cultural expressions; (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner; (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace; (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples; (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels; (f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link; (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning; (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory; [and] (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

### **UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage**

The Convention was adopted by UNESCO in 2003 and entered into force on April 20, 2006. It aims at safeguarding intangible cultural heritage, at ensuring respect for the intangible cultural heritage of communities, groups and individuals, at raising awareness of the importance of intangible cultural heritage and at ensuring mutual appreciation thereof, and at providing for international cooperation and assistance.

### **Unfair Competition**

Black's Law Dictionary defines "unfair competition" as "dishonest or fraudulent rivalry in trade and commerce; esp., the practice of endeavoring to pass off one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristic of the article or its packaging".

Paragraph 2 of Article 10*bis* of the Paris Convention for the Protection of Industrial Property provides that "[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition". Paragraph 3 of Article 10*bis* further provides that "[t]he following in particular shall be prohibited: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

### **United Nations Declaration on the Rights of Indigenous Peoples**

The United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples in 2007. The Declaration acknowledges the equal human rights of

indigenous peoples against cultural discrimination and seeks to promote mutual respect and harmonious relations between the indigenous peoples and States.

In relation to traditional knowledge, traditional cultural expressions and genetic resources, Article 31.1 states that: “[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” Article 31.2 further provides that “[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

### **Use of Traditional Cultural Expressions**

Traditional cultural expressions can be used for different purposes. The use of traditional cultural expressions includes commercial use, customary use, and fair use.

#### Commercial Use

Black’s Law Dictionary defines “commercial use” as “[a] use that is connected with or furthers an ongoing profit-making activity.” “Non-commercial use” is defined as “[a] use for private pleasure or business purposes that non involving the generation of income or bestowing a reward or other compensation”.

#### Customary Use

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, defines customary use as “the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners.”

General Guiding Principle (h) of “The Protection of Traditional Knowledge: Revised Objectives and Principles” (WIPO/GRTKF/IC/18/5 Prov.) and “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/17/4) indicates that customary use should be respected. The term “continuing customary use” refers to the persistence and living nature in the use of traditional knowledge and/or traditional cultural expressions by indigenous communities in accordance with their own customary laws and practices.

#### Fair Use

In the field of copyright, Black’s Law Dictionary defines “fair use” as “[a] reasonable and limited use of a copyrighted work without the author’s permission, such as quoting from a book in a book review or using parts of it in a parody. Fair use is a defense to an infringement claim, depending on the following statutory factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount of the work used, and (4) the economic impact of the use.”

### **Willful**

According to Black’s Law Dictionary, “willful” means voluntary and intentional, but not necessary malicious.

### **WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions**

The Model Provisions were adopted in 1982 by a Committee of Governmental Experts convened jointly by WIPO and UNESCO. The provisions provide a *sui generis* model for intellectual property-type protection of traditional cultural expressions/expressions of folklore, which has been fairly widely used by WIPO Member States.

The Model Provisions seek to maintain a balance between the protection against abuses of expressions of folklore, on the one hand, and the freedom and encouragement of further development and dissemination of folklore, on the other. They take into account the fact that expressions of folklore form a living body of human culture, which should not be stifled by too rigid protection.

Under the Model Provisions, traditional cultural expressions/expressions of folklore are protected against “illicit exploitation and other prejudicial actions.” In 2000 and 2001, WIPO surveyed States’ experiences with use and implementation of the Model Provisions. A report is available as WIPO document WIPO/GRTKF/IC/3/10.

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