

The Protection of Traditional Cultural Expressions: Draft Articles

Facilitators' Rev. (June 19, 2019)

PREAMBLE/INTRODUCTION

1. ACKNOWLEDGING the **UN Declaration on the Rights of Indigenous Peoples**, and the aspirations of indigenous [peoples] and local communities [therein];
2. [[Recognizing that indigenous [peoples] and local communities have the right] Recognizing the rights of indigenous [peoples] and the interests of local communities] to maintain, control, protect and develop their intellectual property over their cultural heritage, including their traditional cultural expressions;]
3. Recognizing that the situation of the indigenous [peoples] and local communities varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration;
4. Recognizing that the traditional cultural expressions of indigenous [peoples] and local communities have [intrinsic] value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values;
5. Acknowledging that traditional cultural expressions are frameworks of ongoing creation and distinctive intellectual and creative life that are [intrinsically] important for indigenous [peoples] and local communities;
6. Respecting the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities;
7. Promoting respect for traditional cultural expressions, and for the dignity, cultural integrity and spiritual values of the traditional cultural expression holders who maintain those expressions.
8. Acknowledging that the protection of traditional cultural expressions should contribute toward the promotion of creativity and innovation, and to the transfer and dissemination of traditional cultural expressions for the mutual advantage of holders and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.
9. [Promoting intellectual and artistic freedom, research or other fair practices and cultural exchange [based on mutually agreed terms including fair and equitable sharing of benefits and subject to the free, prior and informed consent, and approval and involvement of indigenous [peoples],[local communities and nations/beneficiaries];]
10. [Ensuring mutual supportiveness with international agreements relating to the protection and safeguarding of traditional cultural expressions, and those relating to IP;]
11. Recognizing and reaffirming the role that the IP system plays in promoting innovation and creativity, transfer and dissemination of traditional cultural expressions and economic development, to the mutual advantage of stakeholders, providers and users of traditional cultural expressions.
12. Recognizing the value of a vibrant public domain and the body of traditional cultural expressions that are available for all to use, [and] which are essential for creativity and innovation [and the need to protect and preserve the public domain].
13. [Recognizing the need for new rules and disciplines concerning the provision of effective and appropriate means for the enforcement of rights relating to traditional cultural expressions, taking into account differences in national legal systems;]

14. [Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future.]

[ARTICLE 1
USE OF TERMS

For the purposes of this instrument:

Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms¹, musical forms², expressions by movement³, tangible⁴ or intangible forms of expression, or combinations thereof.

[Public domain refers, for the purposes of this instrument, to tangible and intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.]

[Alternative

Public domain means the public domain as defined by national law.]

[Publicly available means [subject matter]/[traditional knowledge] that [has lost its distinctive association with any indigenous community and that as such] has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

[["Use"]/["Utilization"] means

- (a) where the traditional cultural expression is included in a product:
 - (i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
 - (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.
- (b) where the traditional cultural expression is included in a process:
 - (i) making use of the process beyond the traditional context; or
 - (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or

¹ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

² [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

³ [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

⁴ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

- (c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]]

[ARTICLE 2
OBJECTIVES

[Alt 1

The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against:

- a. unauthorized⁵ and/or uncompensated⁶ uses of traditional cultural expressions; and
- b. the erroneous grant of intellectual property rights over traditional cultural expressions,

[while supporting the appropriate use of traditional cultural expressions].]

[Alt 2

The objective of this instrument is to support the appropriate use and effective, balanced and adequate protection of traditional cultural expressions within the intellectual property system, in accordance with national law, recognizing the rights of [indigenous [peoples] and local communities] [beneficiaries].]

[Alt 3

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, respecting the interests of indigenous peoples and local communities to:

- (a) prevent the misappropriation, misuse, and unauthorized use of their traditional cultural expressions[, while making the most of the existing intellectual property system];
- (b) encourage and protect creation and innovation, whether or not commercialized, recognizing the value of public domain and the need to protect, preserve and enhance the public domain; and
- (c) prevent the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.
- (d) promote the appropriate use of traditional cultural expression for sustainable, community-based development where so desired by indigenous peoples and local communities.]]

⁵ Unauthorized uses comprise inter alia misappropriation, misuse and unlawful uses of traditional cultural expressions.

⁶ Uncompensated uses include the failure to provide monetary or non-monetary benefits.

[ARTICLE 3

PROTECTION CRITERIA/ELIGIBILITY CRITERIA

[Alt 1

3.1 Subject to Article 3.2, protection shall be extended under this instrument to traditional cultural expressions which are:

(a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];

(b) linked with, and are an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and

(c) transmitted between or from generation to generation, whether consecutively or not.

3.2. A Member State/Contracting Party may under its national law, condition protection on the prior existence of the traditional cultural expressions for a reasonable term as determined by the Member State/Contracting Party.]

[Alt 2

3.1 Protection should be extended under this instrument to traditional cultural expressions which are:

(a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];

(b) linked with, are an integral part of, and are distinctively associated with the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and

(c) transmitted between or from generation to generation, whether consecutively or not for a term not less than fifty years or five generations.]]

[ARTICLE 4
BENEFICIARIES

[Alt 1

The beneficiaries of this instrument are indigenous peoples, local communities, and other beneficiaries,⁷ as may be determined under national law.]

[Alt 2

Beneficiaries of protection under this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.]

[Alt 3

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries, [such as states [and/or nations]], as may be determined under national law.]]

⁷ The term other beneficiaries may include states or nations.

[ARTICLE 5

SCOPE OF [PROTECTION]/[SAFEGUARDING]

[Alt 1

5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.]

[Alt 2

5.1 Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, with the aim of ensuring that:

- (a) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, access to traditional cultural expressions is restricted, including where the traditional cultural expressions are secret or sacred:
 - i. Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional cultural expressions; and receive a fair and equitable share of benefits arising from their use.
 - ii. Beneficiaries have the moral right of attribution and the moral right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.
- (b) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, the traditional cultural expressions are no longer under the exclusive control of beneficiaries, but are still distinctively associated with the beneficiaries' cultural identity:
 - i. Beneficiaries receive a fair and equitable share of benefits arising from their use; and
 - ii. Beneficiaries have the moral right of attribution and the right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.

5.2 [For traditional cultural expressions that are being utilized without the prior informed consent and/or not in accord with customary laws and practices of indigenous [peoples] and local communities, indigenous [peoples] and local communities or other beneficiaries, as applicable, shall have the possibility to request from the relevant national authorities protection provided for in paragraph 5.1(a), taking into account all relevant circumstances, such as:

historical facts, indigenous and customary laws, national and international laws, and evidence of cultural harms that could result from such unauthorized utilization.]]

[Alt 3

5.1 Where the [protected] traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, Member States should/shall:

- (a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to:
 - i. [create,] maintain, control and develop said [protected] traditional cultural expressions;
 - ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret [protected] traditional cultural expressions;
 - iii. [authorize or deny the access to and use/[utilization] of said [protected] traditional cultural expressions based on free, prior and informed consent or approval and involvement and mutually agreed terms;]
 - iv. protect against any [false or misleading] uses of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and
 - v. [prevent] prohibit use or modification which distorts or mutilates a [protected] traditional cultural expression or that otherwise diminishes its cultural significance to the beneficiary.
- (b) encourage users [to]:
 - i. attribute said [protected] traditional cultural expressions to the beneficiaries;
 - ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the [protected] traditional cultural expressions]; and
 - iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions.

5.2 [Where the [protected] traditional cultural expression is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is/are publicly available [but neither widely known, [sacred], nor [secret]], Member States should/shall encourage that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to encourage users [to]]:

- (a) attribute and acknowledge the beneficiaries as the source of the [protected] traditional cultural expressions, unless the beneficiaries decide otherwise, or the [protected] traditional cultural expressions is not attributable to a specific indigenous people or local community[; and][.]

- (b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the [protected] traditional cultural expressions;
- (c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions[; and][.]]
- (d) [refrain from any [false or misleading uses] of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

5.3 [Where the [protected] traditional cultural expressions is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, Member States should/shall encourage users of said [protected] traditional cultural expressions [to], in accordance with national law:

- (a) attribute said [protected] traditional cultural expressions to the beneficiaries;
- (b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions;
- (c) [protect against any [false or misleading] uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries[;]] [and]
- (d) where applicable, deposit any user fee into the fund constituted by such Member State.]]]

[ARTICLE 6

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

[Alt 1

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument.

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]]

[Alt 2

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in conjunction with the beneficiaries, to administer the rights/interests provided for by this [instrument].

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]]

[ARTICLE 7

EXCEPTIONS AND LIMITATIONS

[Alt 1

In complying with the obligations set forth in this instrument, Member States [may in special cases,] [should] adopt justifiable exceptions and limitations necessary to protect the public interest, in consultation with the beneficiaries, where applicable, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries, [and the customary law of indigenous [peoples] and local communities,] nor unduly prejudice the implementation of this instrument.]

[Alt 2

In implementing this instrument, Member States [may] [should] adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.
2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:
 - (a) learning teaching and research;
 - (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
 - (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.
3. A Member State may provide for exceptions and limitations [other than] [in addition to] those permitted under paragraph (2).
4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a [protected] traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.]

[Alt 3

General Exceptions

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [in consultation with the beneficiaries] [with the involvement of beneficiaries][, provided that the use of [protected] traditional cultural expressions:

- (a) [acknowledges the beneficiaries, where possible;]
- (b) [is not offensive or derogatory to the beneficiaries;]

- (c) [is compatible with fair use/dealing/practice;] or
- (d) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

7.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional cultural expressions, [Member States]/[Contracting Parties] [may]/[should]/[shall] not establish exceptions and limitations.]

Specific Exceptions

7.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law or, as appropriate, of the [holders]/[owners] of the original work:

- (a) [for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;]
- (b) [for preservation, [display], research and presentation in archives, libraries, museums or other cultural institutions recognized by national law, for non-commercial cultural heritage or other purposes in the public interest;]
- (c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]]

7.4 [Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:

- (a) [the use of traditional cultural expressions in cultural institutions recognized under the appropriate national law, archives, libraries and museums, for non-commercial cultural heritage or other purposes in the public interest, including for preservation, [display], research and presentation;]
- (b) the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]
- (c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]
- (d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]]

7.5 [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law, for works protected by [intellectual property rights [including]]/[copyright, or signs and symbols protected by trademark, or inventions protected by patents or utility models and designs protected by industrial design rights, such act [should]/[shall] not be prohibited by the protection of traditional cultural expressions].]]

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]

[Option 1

8.1 [Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional cultural expressions in accordance with [this [instrument]/[[which may] [should]/[shall] last as long as the traditional cultural expressions fulfill/satisfy the [criteria of eligibility for protection] according to this [instrument], and in consultation with beneficiaries.]]

8.2 [Member States]/[Contracting Parties] may determine that the protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, [should]/[shall] last indefinitely.]

[Option 2

8.1 [Member States]/[Contracting Parties] shall protect the subject matter identified in this [instrument] as long as the beneficiaries of protection continue to enjoy the scope of protection in Article 3.]

[Option 3

8.1 [[Member States]/[Contracting Parties] may determine that the term of protection of traditional cultural expressions, at least as regards their economic aspects, [should]/[shall] be limited.]]

[ARTICLE 9]
FORMALITIES

[Option 1

9.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.]

[Option 2

9.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]

9.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.]

[ARTICLE 10

[SANCTIONS, REMEDIES AND EXERCISE OF [RIGHTS]/[INTERESTS]]

[Alt 1

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument.]

[Alt 2

10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.]

[Alt 3

Member States should undertake to adopt appropriate, effective and proportionate legal and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.]

[Alt 4

Member States/Contracting Parties should/shall provide, in accordance with national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the interests of the beneficiaries.]]

[ARTICLE 11]

[TRANSITIONAL MEASURES

11.1 This [instrument] [should]/[shall] apply to all traditional cultural expressions which, at the time of the [instrument] coming into effect/force, fulfill the criteria set out in this [instrument].

[11.2 *Option 1* [[Member States]/[Contracting Parties] [should]/[shall] secure the rights acquired by third parties under national law prior to the entry into effect/force of this [instrument]].]

[11.2 *Option 2* Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of this [instrument] and which would not be permitted or which would be otherwise regulated by the [instrument], [[should]/[shall] be brought into conformity with the [instrument] within a reasonable period of time after its entry into effect/force, subject to Paragraph 3]/[[should]/[shall] be allowed to continue].]

11.3 With respect to traditional cultural expressions that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries [should]/[shall] have the right to recover such traditional cultural expressions.]

[ARTICLE 12]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS

12.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.]

[12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]

[ARTICLE 13]

[NATIONAL TREATMENT

Each [Member State]/[Contracting Party] [should]/[shall] accord to beneficiaries that are nationals of other [Member States]/[Contracting Parties] treatment no less favourable than that it accords to beneficiaries that are its own nationals with regard to the protection provided for under this [instrument].]

[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13
NO SUCH PROVISIONS]

[ARTICLE 14]

[TRANSBOUNDARY COOPERATION]

In instances where [protected] traditional cultural expressions are located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] co-operate in addressing instances of transboundary [protected] traditional cultural expressions., with the involvement of indigenous [peoples] and local communities concerned, where applicable, with a view to implementing this [instrument].]

ARTICLE 15

[CAPACITY BUILDING AND AWARENESS RAISING

15.1 [Member States]/[Contracting Parties] [should]/[shall] cooperate in the capacity building and strengthening of human resources, in particular, those of the beneficiaries, and the development of institutional capacities, to effectively implement the [instrument].

15.2 [Member States]/[Contracting Parties] [should]/[shall] provide the necessary resources for indigenous [peoples] and local communities and join forces with them to develop capacity-building projects within indigenous [peoples] and local communities, focused on the development of appropriate mechanisms and methodologies, such as new electronic and didactical material which are culturally adequate, and have been developed with the full participation and effective participation of indigenous [peoples] and local communities and their organizations.

15.3 [In this context, [Member States]/[Contracting Parties] [should]/[shall] provide for the full participation of the beneficiaries and other relevant stakeholders, including non-government organizations and the private sector.]

15.4 [Member States]/[Contracting Parties] [should]/[shall] take measures to raise awareness of the [instrument,] and in particular educate users and holders of traditional cultural expressions of their obligations under this instrument.]

[End of Document]