

WIPO



WIPO/GRTKF/IC/7/4
ORIGINAL: English
DATE: August 27, 2004

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

**INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

Seventh Session
Geneva, November 1 to 5, 2004

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS
OF FOLKLORE:

OUTLINE OF POLICY OPTIONS AND LEGAL MECHANISMS

Document prepared by the Secretariat

SUMMARY

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') decided at its sixth session to develop two complementary sets of materials: (i) "an overview of policy objectives and core principles for the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF);" and (ii) "an outline of the policy options and legal mechanisms for the protection of TCE subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option."

2. The separate document WIPO/GRTKF/IC/7/3 provides draft material for the first proposed outcome, the overview of policy objectives and core principles. Such general requirements may in practice be implemented by a wide range of distinct national and regional legal mechanisms, ranging over diverse forms of IP right, adapted IP rights, the general law of unfair competition and various general legal mechanisms beyond the scope of IP law proper (such as criminal law, the law of delict/torts, the general law of civil liability, cultural heritage preservation laws, blasphemy laws, customary laws, contract law, employment law and marketing and labeling laws and schemes). National policymakers have a wide choice of policy options and legal mechanisms to give effect to objectives and principles such as those suggested in WIPO/GRTKF/IC/7/3. The present document illustrates the choice by providing draft materials for the Committee's review that could form the second agreed outcome, the outline of policy options and legal mechanisms. It illustrates that it is possible to draw from varied existing practical experiences and select specific mechanisms, causes of action, doctrines and other means to achieve such objectives and to implement such principles.

3. Similarly to WIPO/GRTKF/IC/7/3, the material in this companion document is not, in substance, new to the Committee: it simply distils and structures the existing legal mechanisms and the extensive practical experience with protection of TCEs/EoF that have already been widely discussed by the Committee, and draws on the Committee's own deliberations and on the diverse materials put to the Committee by many Member States and observers. The contents of this document find their origins in the extensive community-based consultations in 1998 and 1999 which allowed WIPO to listen directly to holders of TCEs/EoF about their needs for legal protection; in the many interventions and submissions made by Member States, TK holders and other stakeholders during the past six sessions of the Committee; in community-level, national and regional consultations and projects; in responses to questionnaires, reports and studies reporting on actual experience in many countries; in stakeholder comments on earlier working documents made at previous sessions of the Committee; and in the past work of WIPO on TCEs/EoF. This companion document and document WIPO/GRTKF/IC/7/3 therefore distill the substantive results from the full sweep of WIPO's work on TCEs/EoF dating back many years.

4. To serve as a useful reference and to maintain consistency, this document follows closely the structure proposed in WIPO/GRTKF/IC/7/3. Both documents draw on the same background of legal measures used and practical experience developed by countries and communities in many geographical regions, at every level of economic development. They both draw extensively on policy discussions and conclusions from related international policy processes which touch upon TCEs/EoF protection. Yet this document has a different focus, and a complementary role in relation to WIPO/GRTKF/IC/7/3. It is structured as follows:

(a) *policy options for the protection of TCEs/EoF*, comprising:

(i) *options for the objectives of protection*, recording various ways in which the policy objectives suggested in WIPO/GRTKF/IC/7/3 have been expressed in international, regional and national laws and instruments;

(ii) *options relating to the general form of protection*, recording the range of legal doctrines and general principles that have been applied to the protection of TCEs/EoF, corresponding broadly to the general guiding principles suggested in WIPO/GRTKF/IC/7/3;

(b) *legal elements of protection of TCEs/EoF*, showing how legal provisions that have been developed and used in international, national and regional laws and instruments could implement the specific substantive principles suggested in WIPO/GRTKF/IC/7/3.

5. For ease of reference, the draft outline of policy options and legal mechanisms is set out in Annex I to this document.

I. INTRODUCTION

6. At its sixth session in March 2004, the Committee decided that the WIPO Secretariat should prepare drafts of “an overview of policy objectives and core principles for protection of TCEs; and, an outline of the policy options and legal mechanisms for the protection of TCE subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.”¹

7. Document WIPO/GRTKF/IC/7/3 suggests for the Committee’s consideration draft policy objectives and core principles for the protection of TCEs/EoF, which may evolve into an agreed international platform for protection. The present document is a supplementary resource that sets out for the Committee’s review a draft outline of the policy options and legal mechanisms that would operate at the national level to protect TCEs/EoF in line with the objectives and principles articulated at the international level.

8. TCEs/EoF are necessarily diverse in their nature; they are developed and maintained by a wide range of communities, people and individuals in diverse cultural and legal contexts and in many different countries; and the needs and aspirations of relevant communities are similarly diverse. It follows that the possible means of protecting TCEs/EoF against misuse or misappropriation, and the choices actually taken, also vary widely. Many communities cherish this diversity as integral to their cultural identity. Yet the Committee has also worked towards a common approach or shared international perspective on the protection of TCEs/EoF, and the current mandate of the Committee excludes no outcome, including an international instrument or instruments.

9. Respecting these complementary goals, WIPO/GRTKF/IC/7/3 and this document together seek firstly to set out a common approach, built on actual experience with TCEs/EoF protection; and secondly to leave open the policy space for this necessary diversity to find practical expression and to support policymakers and communities in considering all possible options, so that protection can be tailored and appropriate to the actual needs and context of communities. WIPO/GRTKF/IC/7/3 therefore articulates suggested policy objectives and

¹ Report of Sixth Session, WIPO/GRTKF/IC/6/14, par. 66.

core principles, with a view to establishing common ground internationally. By contrast, this companion document seeks to document the diverse measures that have been used at the international, regional and national levels to protect TCEs/EoF, to give practical effect to the policy objectives of protection, and to apply in practice the principles of protection.

WIPO/GRTKF/IC/7/3 is an attempt to distil a wide range of policy and legal approaches into a shared international platform for protection; this document aims to serve as a menu of options to assist policymakers and communities in making practical choices about protection.

10. This document gives only an outline of options and legal mechanisms, giving several examples of diverse ways of implementing broader objectives and principles, so that it remains brief and provisional. It could evolve and be further developed in line with the further evolution of the objectives and principles set out in WIPO/GRTKF/IC/7/3. No specific decisions in respect of this document are suggested at this stage, and the Committee is invited merely to note and comment on it.

11. The options and mechanisms set out in this document are examples only. They do not seek to place limits on the parameters of the debate concerning TCEs/EoF protection, to prescribe any particular outcomes or solutions, nor to define the form that they may take. Clearly it is open for the Committee to base its work on alternative approaches and proposals, and this document is provided as only one input to its deliberations.

Flexibility for national policy and legislative development

12. A wide range of distinct national and regional legal mechanisms are available to give effect to the kind of policy objectives and core principles set out in WIPO/GRTKF/IC/7/3. These range over diverse forms of IP right, adapted IP rights, the general law of unfair competition and various general legal mechanisms beyond the scope of IP law proper (such as criminal law, the law of delict/torts, cultural heritage preservation laws, blasphemy laws, customary laws, contract law, employment law and marketing and labeling laws and schemes). This document documents some of the policy options taken, and the legal mechanisms deployed, to achieve the objectives of protection and to give effect to the principles established for protection.

13. This approach is consistent with and expresses most directly the ‘principle of flexibility and comprehensiveness’ suggested in WIPO/GRTKF/IC/7/3. This principle concerns the need to respect that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing laws to protect TCEs/EoF, and pre-empt necessary consultation with stakeholders and holders of TCEs in particular. It also concerns the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection.

14. This approach – broader than a regime strictly of exclusive proprietary rights – is relatively common in the IP field. Previous documents gave examples of IP conventions which establish certain general principles and which give scope for wide variation within the laws of the signatories.² Even where international obligations create minimum substantive

² WIPO/GRTKF/IC/6/6, referring for example to the TRIPS Agreement, Article 1.1; Rome Convention, Article 7; the Satellites Convention, Article 2; the Lisbon Convention, Article 8; the Washington Treaty, Article 4; and the Phonograms Convention, Article 3.

standards for national laws, it is accepted that the choice of legal mechanisms is a matter of national discretion. For example the Phonograms Convention, 1971, in setting certain general standards, provides that the means for their implementation ‘shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.’³ A standard commentary on the Rome Convention, 1961 similarly notes that a provision on rights of performers is worded ‘to leave complete freedom of choice as to the means used to implement the Convention, and to choose those which [is thought] most appropriate and best. They may be based on any one or more of a number of legal theories: law of employment, of personality, of unfair competition or unjust enrichment, etc. [including criminal law] – and of course, if they wish, an exclusive right. The important thing is that those means achieve the purpose [of the defined protection].’ Equally, the Berne Convention, 1971 (Article 6*bis*(3)) provides that the ‘means of redress for safeguarding [moral rights] shall be governed by the legislation of the country where protection is claimed’. Accordingly, moral rights are in practice protected either under copyright law or through laws in other areas such as defamation, unfair competition or contract. The need for flexibility was recognized in past international standards for protection of TCEs/EoF. The Model Provisions, 1982 refer to a ‘law,’ but this term appears in square brackets ‘in order to make it clear that they do not necessarily have to form a separate law, but may constitute, for example, a chapter of an intellectual property code, and do not have to be a statute passed by the legislative body, but may be a decree or decree law, for example. The Model Provisions were designed with the intention of leaving enough room for national legislations to adopting the type of provisions best corresponding to the conditions existing in a given country’.⁴

15. Actual experience with TCEs/EoF protection has shown that it is unlikely that any single ‘one-size-fits-all’ or ‘universal’ international template will be found to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries.⁵ Forms of traditional creative expression and customary means of regulating their use, transmission, protection and preservation are diverse. Concerns have been expressed that attempts to codify and institutionalize protection of ‘cultural identity’ are undesirable and that a flexible and inclusive approach is preferable. An indigenous organization has put it best: “Any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples’ knowledge runs the risk of collapsing this rich jurisprudential diversity into a single ‘model’ that will not fit the values, conceptions or laws of any indigenous society.”⁶ Provisions for the protection of TCEs/EoF adopted at the international level would also have to accommodate legislative and jurisprudential diversity within current national and regional approaches.⁷ In particular, experience has shown that a mix of measures, between proprietary

³ Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971), Art. 3.

⁴ Commentary to the Model Provisions, 1982.

⁵ Venezuela (WIPO/GRTKF/IC/6/14, para. 72), African Group (WIPO/GRTKF/IC/6/14, para. 73), Canada (WIPO/GRTKF/IC/6/14, para. 79), Syria (WIPO/GRTKF/IC/6/14, para. 80), New Zealand (WIPO/GRTKF/IC/6/14, para. 88), Kaska Dena Council (WIPO/GRTKF/IC/ 6/14, para. 59).

⁶ Four Directions Council, ‘Forests, Indigenous Peoples and Biodiversity,’ Submission to the Secretariat for the CBD, 1996.

⁷ See Final Report on National Experiences with the Legal Protection of Expressions of Folklore (WIPO/GRTKF/IC/ 3/10); Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous

and non-proprietary approaches, and between distinct new measures and adaptations of existing IP rights, is more likely to achieve the objectives of protection.

II. THE USE OF CERTAIN TERMS

‘Traditional cultural expressions’/‘expressions of folklore’

16. In line with previous documents and discussions, the terms ‘traditional cultural expressions’ (TCEs) and ‘expressions of folklore’ (EoF) are used in this document as interchangeable synonyms.⁸ The abbreviation ‘TCEs/EoF’ is used in most cases. This usage respects the concerns that some communities have expressed concerning negative connotations of the term ‘folklore’, but also respects the fact that ‘folklore’ is widely used in many national laws and in various international instruments.

TCEs/EoF and ‘traditional knowledge’

17. This document and the companion document WIPO/GRTKF/IC/7/4 deal specifically with the protection of TCEs/EoF. WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6 are directly parallel documents that concern protection of traditional knowledge as such. This follows the Committee’s established approach of considering the legal protection of TCEs/EoF and of TK *stricto sensu* in parallel but separately, as explained and discussed in previous documents⁹ and as suggested by many Member States.¹⁰ As these principles clarify, this concerns specific means of legal protection against misuse of this material by third parties beyond the traditional context, and does not seek to impose definitions or categories on the customary laws, protocols and practices of indigenous peoples and traditional and other communities. This approach is accordingly compatible with and respectful and supportive of the traditional context in which TCEs/EoF and TK are often perceived as integral parts of an holistic cultural identity, subject to the same body of customary law and practices.

The term ‘protection’

18. Continuing past practice,¹¹ the term ‘protection’ refers to protection such as that typically provided by IP laws, essentially to provide legal means to restrain third parties from

[Footnote continued from previous page]

Heritage and Intellectual Property, 2004 (Kluwer); Kuruk, P., “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,” 48 *American University Law Review* 769 (1999).

⁸ See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

⁹ See the distinctions drawn in WIPO/GRTKF/IC/5/12 and further discussion in WIPO/GRTKF/IC/6/3.

¹⁰ See African Group (WIPO/GRTKF/IC/5/15, par. 123); Ecuador (WIPO/GRTKF/IC/5/15, para. 157), Switzerland (WIPO/GRTKF/IC/5/15, para. 143), European Union and its Member States (WIPO/GRTKF/IC/3/17, para. 218 and WIPO/GRTKF/IC/6/14, paras. 27 and 192), Canada (WIPO/GRTKF/IC/3/17 para. 235), China (WIPO/GRTKF/IC/3/17, para. 242) and the USA (WIPO/GRTKF/IC/3/17, para. 254), African Group (WIPO/GRTKF/IC/6/14, para. 188), GRULAC (WIPO/GRTKF/IC/6/14, para. 189), Venezuela (WIPO/GRTKF/IC/ 6/14, para. 34), Egypt (WIPO/GRTKF/IC/6/14, para. 196).

¹¹ See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3; more generally WIPO/GRTKF/IC/5/12.

undertaking certain unauthorized acts that involve the use of the protected material. ‘Protection’ in this sense must be distinguished from the concepts of ‘preservation’ and ‘safeguarding’, which in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability.¹² ‘Protection’ in the IP sense does not refer only to exclusive property rights – moral rights, equitable remuneration schemes and unfair competition are also part of copyright, related rights and IP generally and are of particular relevance to addressing concerns raised by indigenous peoples and traditional and other communities in respect of TCEs/EoF.

Beneficiaries of protection: indigenous peoples and traditional and other cultural communities

19. Earlier documents have referred broadly and inclusively to the intended beneficiaries of the protection of TCEs/EoF as including ‘indigenous peoples’, ‘traditional communities’ and/or ‘local communities’, and other variations of these terms. Various terms are used in existing laws.¹³ Some delegations¹⁴ and representatives of observers¹⁵ have stated that the focus of the Committee’s work should be broader than ‘indigenous peoples’ in the stricter sense of the term,¹⁶ although the particular concerns of indigenous peoples have been widely voiced in the Committee, from both governmental and non-governmental participants, so some distinct recognition of these communities may be maintained even in a broader context.

¹² See Glossary: Intangible Cultural Heritage, Netherlands Commission for UNESCO, 2002.

¹³ The Model Provisions, 1982 refer to ‘communities’, the Pacific Regional Model to ‘traditional owners’ and the Peru Law, 2002 to ‘indigenous peoples’, for example.

¹⁴ While indigenous peoples are important stakeholders in this discussion, ‘not all expressions of folklore belonged to indigenous peoples, and that it [is] necessary also to consider non-indigenous expressions of folklore’, Mexico (WIPO/GRTKF/IC/6/14, para. 30). See also Canada (WIPO/GRTKF/IC/ 6/14, para. 39).

¹⁵ The American Folklore Society (AFS) has stated that the term ‘folklore’ includes, but is not limited, to the knowledge of indigenous peoples. The AFS suggested that the work of WIPO address all traditional cultural groups who were entitled to IP protection of their traditional cultures, in addition to indigenous peoples, such as the Cajuns in Louisiana, the Amish in Pennsylvania and African-, Asian- and Latin-American communities in the United States of America. The AFS wished therefore to expand the concept of ‘traditional group’ so that it could be ascribed to various identities, such as regional, religious, ethnic or familial identities (WIPO/GRTKF/IC/5/15, para. 57).

¹⁶ The notion ‘indigenous peoples’ in the ‘stricter sense’ of the term refers to, as was discussed in the WIPO report on the fact-finding missions conducted in 1998 and 1999, the description of the concept “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, which 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”. The Philippines Law, 1997 and the Peru Law of 2002 use the term in this sense.

20. Further discussion of this issue may be needed at some stage. However, the choice of term used to describe the beneficiaries of protection is probably best left for national and community consultations and for their decisions, in line with the proposition that any internationally agreed principles should allow national lawmakers sufficient flexibility regarding their implementation. For present purposes, the broad and inclusive term ‘indigenous peoples and traditional and other cultural communities’, or simply ‘communities’ in short, will be used in this document and in WIPO/GRTKF/IC/7/4. The use of this term is not intended to suggest any consensus among Committee participants on the validity or appropriateness of this or other terms, and does not affect or limit the use of other terms in national laws or in discussions in other international fora.

III. BASIS IN PAST DISCUSSION AND ACTUAL EXPERIENCE

21. The document draws directly upon the full range of materials that have served as the basis of the Committee’s work so far, such as previous working documents prepared for the Committee¹⁷; interventions and submissions made by Member States, communities and other stakeholders, during Committee sessions but also at national and regional consultations¹⁸; reports¹⁹; studies²⁰; responses to questionnaires²¹; and comments on the earlier working documents made at previous sessions of the Committee.²² More recent documents and submissions have also been taken into account, such as the proposal put to the Committee by the African Group at the Committee’s sixth session (document WIPO/GRTKF/IC/6/12, entitled “Objectives, Principles and Elements of an International Instrument, or Instruments, on Intellectual Property in relation to Genetic Resources and on the Protection of Traditional Knowledge and Folklore”), which many delegations welcomed and found helpful as a framework for further discussion and elaboration.²³

22. A wide variety of international, regional and national instruments and laws (many of which are summarized and analyzed in WIPO/GRTKF/IC/5/INF/3 and WIPO/GRTKF/IC/5/INF/4) have been studied and taken into account, such as:

(i) the Tunis Model Law on Copyright for Developing Countries, 1976 (‘the Tunis Model Law’);

¹⁷ Such as documents WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

¹⁸ See documents WIPO/GRTKF/IC/4/4, WIPO/GRTKF/IC/5/4 and WIPO/GRTKF/IC/6/7, for example, for lists of these meetings and consultations.

¹⁹ Such as the report of the fact-finding missions conducted by WIPO in 1998 and 1999.

²⁰ Such as ‘Minding Culture’ by Terri Janke and ‘National Experiences of India, Indonesia and the Philippines’ by Valsala Kutty.

²¹ Such as WIPO/GRTKF/IC/3/10.

²² See in particular the reports of previous Committee sessions.

²³ Such as Group B (WIPO/GRTKF/IC/6/14, para. 191), European Community (WIPO/GRTKF/IC/6/14, para. 192), Group of Central and Baltic States (WIPO/GRTKF/IC/6/14, para. 193), China (WIPO/GRTKF/IC/6/14, para. 194), Syrian Arab Republic (WIPO/GRTKF/IC/6/14, para. 203), Canada (WIPO/GRTKF/IC/6/14, para. 205), Norway (WIPO/GRTKF/IC/6/14, para. 216), Pakistan (WIPO/GRTKF/IC/6/14, para. 217), ARIPO (WIPO/GRTKF/IC/6/14, para. 225), URTNA (WIPO/GRTKF/IC/6/14, para. 227) and the Kaska Dena Council speaking on behalf of several indigenous peoples’ organizations (WIPO/GRTKF/IC/6/14, para. 228).

(ii)the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 ('the Model Provisions');

(iii)the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999 ('the Bangui Agreement');

(iv)the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 ('the Panama Law');

(v)the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 ('the Pacific Regional Framework');

(vi)the Indigenous Peoples Rights Act of 1997 of the Philippines ('the Philippines Law'); and

(vii)the Indian Arts and Crafts Act, 1990 of the United States of America ('the USA Arts and Crafts Act').

23. For ease of reference a table analysing and comparing many of these laws is attached as Annex II (previously circulated to the Committee as document WIPO/GRTKF/IC/5/INF/3).

24. Also consulted were materials such as the Principles and Guidelines for the Protection of the Heritage of Indigenous People, prepared by Dr. Erica Irene-Daes for the UN's Working Group on Indigenous Populations, the recently adopted UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage and the Draft UNESCO Convention on the Diversity of Cultural Contents and Artistic Expressions. In addition, several other national laws have been examined which are too numerous to mention. These are mainly the laws of African and other States which have enacted protection for TCEs/folklore based upon either the Tunis Model Law, 1976 or the Model Provisions, 1982. Particular attention has been paid, as examples only, to the copyright laws of Nigeria and Tunisia, which were presented at the panel on TCEs/EoF held during the Committee's fourth session. The Peruvian Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources ('the Peru Law, 2002') has also been analysed and taken into account.

25. Early drafts of these documents or of the ideas contained in them were discussed and consulted on as far as possible in a variety of meetings and other occasions.²⁴ Following suggestions made by the Delegations of Egypt and the Islamic Republic of Iran and other participants at the sixth session²⁵, particular efforts were made to obtain the comments and inputs of folklorists and other such experts, including through both formal and less formal meetings and interactions.²⁶

²⁴ Such as: WIPO and US Copyright Symposium, Washington DC, May 6 and 7, 2004; 43rd Annual Session of the Asian-African Legal Consultative Committee, Bali, June 21-25, 2004; South African Developing Country (SADC) Workshop on Indigenous Knowledge Systems Policy Development and Capacity Building, Pretoria, June 7 to 9, 2004; 3rd Session of the UN Permanent Forum on Indigenous Issues, May 10 to 21, 2004; OHCHR and ILO Indigenous Fellowship Program, June 10, 2004, Working Group on Indigenous Populations, Geneva, July 2004; WIPO-WTO Colloquium for Teachers of Intellectual Property Law, Geneva, June 28 to July 9, 2004.

²⁵ WIPO/GRTKF/IC/6/14, paras. 42 and 52.

²⁶ Such as 'Folklore, Aesthetic Ecologies and Public Domain', University of Pennsylvania, April 2 and 3, 2004; 8th Congress of the *Société internationale d'ethnologie et de folklore* (SIEF) and

IV. THE INTERNATIONAL DIMENSION

26. Many Member States have stated that the ‘international dimension’ of the protection of TCEs/EoF is of paramount importance. The Final Report on the responses to the WIPO questionnaire on folklore²⁷ proposed to the Committee at its third session (June 2002) that it specifically address modalities for the international protection of TCEs/EoF, but this was not approved at the time. The renewed mandate for the Committee’s work in 2004-2005 requested the Committee to focus in particular on the international dimension of the issues under its mandate. Accordingly, at its sixth session, the Committee discussed the international dimension of its work, drawing on a survey of the ‘international dimension’ of TK and TCEs/EoF in general (WIPO/GRTKF/IC/6/6). The Committee concluded that the international dimension was not a distinct issue but an integral part of the substantive consideration of the protection of TK and TCEs/EoF.²⁸ Accordingly, this document integrally discusses policy options and legal mechanisms relevant to the international dimension.

V. CAPACITY-BUILDING AND OTHER PRACTICAL ACTIVITIES

27. It has been widely stressed that any protection for the benefit of the holders of TCEs/EoF should be both effective in practice, and should be tailored to the specific context and resource constraints of these communities. Hence the suggested principles in WIPO/GRTKF/IC/7/3 refer to the need for effective, appropriate and accessible measures for protection. This also underscores the need for coordinated capacity-building and awareness-raising to ensure the practical effectiveness of any protection. A series of practical capacity-building tools is under development. These are not described in detail in the current document, but are set out in the Annex both to WO/GA/31/5 and to WIPO/GRTKF/IC/7/INF/3, with the following notation:

These materials already produced or in development: background capacity-building and information resources to support community-level planning and decision-making and to provide background for legal and policy advisors for indigenous and local communities, other stakeholders, policymakers and legislators. Practical resources for action at the community level, for assessing and exploring in detail the options that are chosen at the policy level, and to support the elaboration or implementation of national and regional protection mechanisms. Draw extensively on the actual experiences documented in the IGC at the community, national and regional levels, as well as relevant international processes. Consistent with overall policy settings and outcomes established by IGC, but prepared as sources of technical information only and not to pre-empt or determine policy choices.

28. A comprehensive ‘Practical Guide’ on the effective protection of TCEs is under preparation. In the interim, a ‘Questionnaire on Establishing Effective Systems for the

[Footnote continued from previous page]

the 3rd Congress of the *Association d’anthropologie méditerranéenne* (ADAM), Marseille, April 28, 2004.

²⁷ WIPO/GRTKF/IC/3/10.

²⁸ The African Group (WIPO/GRTKF/IC/6/14, para. 188), Brazil (WIPO/GRTKF/IC/6/14, para. 195), Thailand (WIPO/GRTKF/IC/6/14, para. 201), Canada (WIPO/GRTKF/IC/6/14, para. 205). See also para. 231 of WIPO/GRTKF/IC/6/14.

Protection of Traditional Cultural Expressions/Expressions of Folklore' has been prepared by the Secretariat as an informal resource which States and regional organizations may wish to use to structure, facilitate and guide national and regional consultations on the subject. It uses and operationalizes the 'Practical Steps' set out in document WIPO/GRTKF/IC/6/3. A copy of the Questionnaire is available as WIPO/GRTKF/IC/7/INF 4. Ancillary practical materials are also under development. Subject to the availability of resources, the Secretariat is examining the development, with the close involvement of concerned parties, of practical materials, guidelines and 'best practices' for archives, museums and other repositories of TCE subject matter, and for commercial users of TCEs/EoF²⁹ (activities which, amongst others, received specific support from the UN Permanent Forum on Indigenous Issues; see document WIPO/GRTKF/IC/7/13); and of technical specifications for TCE databases and registries.³⁰ Such forms of practical assistance, in particular a 'guide' drawing from best practices, also received support at a Sub-Regional seminar on TCEs/EoF held in Rabat, Morocco in May 2003.

VI. CONCLUSIONS

29. This document has been prepared as a supplementary resource, following the basic structure suggested in WIPO/GRTKF/IC/7/3. If this approach is generally acceptable, it would suggest that the further evolution of this material should also track the further development of that document. For this reason, the current draft avoids detail, and instead provides an outline of a more detailed set of material that could be developed in accordance with the development of the framework proposed in WIPO/GRTKF/IC/7/3. This material is essentially proposed as a guide to the development of TCEs/EoF protection at the national or regional level, in contrast to WIPO/GRTKF/IC/7/3 which suggests material for a shared international perspective. Given the requirement in the Committee's mandate that it focus on the international dimension, it is suggested that this document be given less immediate priority (while still underscoring the continuing need for coordinated capacity-building and policy development at the national and regional levels). It could then be further developed and enhanced based on the overall guidance provided by the Committee in the context of the development of WIPO/GRTKF/IC/7/3.

30. The Committee is invited: (i) to note and comment on the suggested outline of policy options and legal mechanisms for protection set out in Annex I of this document; and (ii) to note the possible further development of this material in the light of any decisions concerning the proposals in WIPO/GRTKF/IC/7/3.

[Annex I follows]

²⁹ New Zealand (WIPO/GRTKF/IC/6/14, para. 41), with support from several others.

³⁰ India (WIPO/GRTKF/IC/6/14, para. 48).

ANNEX I

DRAFT OUTLINE OF POLICY OPTIONS AND LEGAL MECHANISMS FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

A. POLICY OPTIONS FOR THE PROTECTION OF TCES/EOF

A.1 Options for realizing the objectives of protection

31. In WIPO/GRTKF/IC/7/3, the following were suggested as objectives which the protection of traditional cultural expressions or expressions of folklore should aim to achieve:

[Recognize value]

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

[Promote respect]

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

[Meet the actual needs of communities]

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

[Empower communities]

(iv) be achieved in a manner inspired by the protection provided for intellectual creations and innovations, in a manner that is balanced and equitable and that effectively empowers indigenous peoples and traditional and other cultural communities to exercise due authority over their own TCES/EoF, including through appropriate moral and economic rights, should they wish to do so;

[Support customary practices]

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

[Contribute to safeguarding traditional cultures]

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

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

(vii) recognize, and operate consistently with, other international and regional instruments and processes;

[Encourage community innovation and creativity]

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

[Promote intellectual and cultural exchange]

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

[Contribute to cultural diversity]

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

[Promote community development and legitimate trading activities]

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

[Preclude invalid IP rights]

(xii) curtail the grant, exercise and enforcement of invalid intellectual property rights acquired by unauthorised parties over TCEs/EoF, and derivatives thereof;

[Enhance certainty, transparency and mutual confidence]

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

[Complement protection of traditional knowledge]

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

32. The following are examples of objectives and preambular language contained in existing laws and instruments for the specific protection of TCEs/EoF. They indicate different ways in which the objectives set out in WIPO/GRTKF/IC/7/3 could be expressed at the national and regional levels:

(i) the Preamble to the Model Provisions, 1982 reads as follows:

“Considering that folklore represents an important part of the living cultural heritage of the nation, developed and maintained by the communities within the nation, or by individuals reflecting the expectations of those communities;

Considering that the dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation;

Considering that any abuse of commercial or other nature or any distortion of expressions of folklore are prejudicial to the cultural and economic interests of the nation;

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve to be protected in a manner inspired by the protection provided for intellectual productions;

Considering that such a protection of expressions of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests”;

(ii) the policy objectives of the Bangui Agreement, 1999 are to promote the effective contribution of IP to the development of Member States [of OAPI], protect IP in an effective and uniform manner, and contribute to the promotion of the protection of literary and artistic property as an expression of cultural and social values;

(iii) the preamble to the Copyright Act of Indonesia, 2002 includes the following statement of objective: “[Considering] that Indonesia is a country which has diversity of ethnics/tribes and culture as well as wealth in the field of arts and literature which needs the protection of copyright for the intellectual property originating from the diversity”;

(iv) the Panama Law of 2000 and related Decree of 2001 aim at protecting the collective IP rights and knowledge of indigenous communities through the registration, promotion, commercialization and marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural identities and for social justice. Another key objective is the protection of the authenticity of crafts and other traditional artistic expressions (Preamble and Article 1 of the Law; Preamble of the Decree);

(v) the USA Arts and Crafts Act, 1990 aims to promote the development of American Indian and Alaska Native arts and crafts, improve the economic status of members of Federally-recognized tribes, and help develop and expand marketing opportunities for arts and crafts produced by American Indians and Alaska Natives;

(vi) the policy objectives in the Nigerian Copyright Act in respect of TCEs/EoF are “to prevent unauthorized use of folklore resources; ensure the honour dignity or the cultural interests of the source community; acknowledge the source of the folklore while not unnecessarily inhibiting the public access to the resources”.³¹

A.2 Options relating to the general form of protection

Introduction

33. This section records the range of legal doctrines and general principles that have been applied to the protection of TCEs/EoF in a variety of international instruments, and regional and national laws. These include use of existing IP systems, adapted IP rights and new, stand-alone *sui generis* systems, as well as non-IP options. The options selected by various countries have depended to a large degree on the policy objectives and national goals being served. Countries which have already elected to provide specific protection for folklore have elected to do so through specific laws on folklore, within broader laws on copyright, or in conjunction with TK protection.

34. The debate about the protection of TCEs often centers on whether adequate and appropriate protection is best provided through either the conventional IP system or through an alternative *sui generis* system. Yet the documented practical experiences of many Member

³¹ Presentation by Nigeria, Fourth Session of the Committee; see WIPO/GRTKF/IC/4/INF/2.

States reflects that existing IP rights and *sui generis* measures are not mutually exclusive but are complementary options.³² A comprehensive approach is likely to consider each of these options, and apply them judiciously to achieve the objectives of protection, accepting the practical reality that the boundaries between these options are not rigid. Effective protection may therefore be found in a combined and comprehensive approach, with a menu of differentiated and multiple levels and forms of protection. The options selected by various countries have depended to a large degree on the policy objectives and national goals being served.

35. This flexibility – encapsulating a comprehensive and combined approach – is a practical articulation of several of the general guiding principles proposed in WIPO/GRTKF/IC/7/3. The suggested ‘Principle of flexibility and comprehensiveness’ underscores that protection should respect the diversity of TCEs/EoF and the wide range of needs of the beneficiaries of protection, should acknowledge diversity in national circumstances and legal systems, and should allow sufficient flexibility for national authorities to determine the appropriate means of achieving the objectives of protection. Protection has accordingly drawn on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *sui generis* extensions or adaptations of IP rights, and specially-created *sui generis* IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with non-proprietary and non-IP measures.

36. The other suggested principles are also directly advanced by such an approach. For example, the ‘Principle of responsiveness to aspirations and expectations of relevant communities’ concerns the need to recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection, address cultural and economic aspects of development, address insulting, derogatory and offensive acts, enable full and effective participation by these communities, and recognize the inseparable quality of traditional knowledge and TCEs/EoF for many communities. Measures for the legal protection of TCEs/EoF should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their TCEs/EoF.

37. A ‘Principle of balance and proportionality’ calls for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF, and of those who use and benefit from them; the need to reconcile diverse policy concerns; and the need for

³² GRULAC (WIPO/GRTKF/IC/1/5), European Community (WIPO/GRTKF/IC/1/13, paras. 20 and 165), Canada (WIPO/GRTKF/IC/1/13, paras. 46 and 166), Norway (WIPO/GRTKF/IC/1/13, para. 33), USA (WIPO/GRTKF/IC/1/13, para. 49), Poland (WIPO/GRTKF/IC/1/13, para. 156), the Asian Group (WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/2/16, para. 170), Ethiopia (WIPO/GRTKF/IC/1/13, para. 50), Asian Group (WIPO/GRTKF/IC/2/16 para. 170), Thailand (WIPO/GRTKF/IC/2/16, para. 172). African Group (WIPO/GRTKF/IC/4/15, para. 62), Brazil (WIPO/GRTKF/IC/4/15, para. 63), Venezuela (WIPO/GRTKF/IC/4/15, para. 65), Colombia (WIPO/GRTKF/IC/4/15, para. 67), Russian Federation (WIPO/GRTKF/IC/4/15, para. 68), Iran (Islamic Republic of) (WIPO/GRTKF/IC/4/15, para. 69), Indonesia (WIPO/GRTKF/IC/4/15, para. 74), Morocco (WIPO/GRTKF/IC/4/15, para. 76), Egypt (WIPO/GRTKF/IC/4/15, para. 80), and Andean Community (WIPO/GRTKF/IC/4/15, para. 82), Peru (WIPO/GRTKF/IC/6/14, para. 77), India (WIPO/GRTKF/IC/6/14, para. 81), New Zealand WIPO/GRTKF/IC/6/14, para. 88)

specific protection measures to be proportionate to the objectives of protection, actual experiences and needs, and the maintenance of an equitable balance of interests. A principle of ‘Principle of respect for and cooperation with other international and regional instruments and processes’ means that TCEs/EoF should be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already established under binding legal instruments. The ‘Principle of recognition of the specific nature, characteristics and traditional forms of cultural expression’ calls for protection to respond to the traditional character of TCEs/EoF; their collective or communal context and the inter-generational character of their development, preservation and transmission; their relationship to a community’s cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and, their constantly evolving character within a community. It also means that special measures for legal protection should also recognize that in practice TCEs/EoF are not always created within firmly bounded identifiable ‘communities’ that can be treated as legal persons or unified actors. TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence.

38. A key principle of ‘Respect for customary use and transmission of TCEs/EoF’ expresses that protection should promote the use, development, exchange, transmission and dissemination of TCEs/EoF by the communities concerned in accordance with their customary laws and practices. Customary use, practices and norms should guide the legal protection of TCEs/EoF as far as possible, on such questions as ownership of rights, management of rights and communal decision-making, equitable sharing of benefits, exceptions and limitations to rights and remedies. And, a ‘Principle of effectiveness and accessibility of protection’ indicates that measures for the acquisition, management and enforcement of rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account of the cultural, social, political and economic context of indigenous peoples and traditional and other cultural communities.

IP and non-IP options

39. IP-type property rights are not the only way to provide protection for TCEs. Comprehensive protection may require a range of IP and non-IP legal tools. Approaches for TCE protection, both within and beyond the IP system, could include:

- (a) Distinct intellectual property rights, including:
 - (i) existing IP rights,
 - (ii) modified or adapted IP rights, and
 - (iii) stand-alone *sui generis* IP systems;
- (b) Unfair competition law;
- (c) Trade practices and marketing laws;
- (d) Use of contracts and licenses;
- (e) Registers, inventories and databases;
- (f) Customary and indigenous laws and protocols;
- (g) Cultural heritage preservation laws and programs;
- (h) General law of civil liability and other remedies, such as rights of publicity, unjust enrichment, confidential information and blasphemy;

- (i) Criminal law.³³

40. These are not mutually-exclusive options, and each may, working together, have a role to play. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

Current IP systems, adapted IP systems and stand-alone sui generis IP systems

41. It is well documented that some, if not many, of the needs and concerns of indigenous peoples and traditional and other cultural communities and their members may be met by solutions existing already within current IP systems, including through appropriate extensions or adaptations of those systems.³⁴ For example:

- (a) copyright and industrial designs laws can protect contemporary adaptations and interpretations of pre-existing materials, even if made within a traditional context;
- (b) copyright law may protect unpublished works of which the author is unknown;
- (c) the *droite de suite* (the resale right) in copyright allows authors of work of arts to benefit economically from successive sales of their works;
- (d) performances of TCEs/EoF may be protected under the WIPO Performances and Phonograms Treaty (WPPT), 1996;
- (e) traditional signs, symbols and other marks can be registered as trademarks;
- (f) traditional geographical names and appellations of origin can be registered as geographical indications;
- (g) the distinctiveness and reputation associated with traditional goods and services can be protected against ‘passing off’ under unfair competition laws and/or the use of certification and collective trade marks;
- (h) secret TCEs/EoF may be protected as ‘confidential information’ or under doctrines such as ‘breach of confidence’.

42. In many of these cases, international protection is available by virtue of relevant treaties, such as the Berne Convention, the TRIPS Agreement and the WPPT, 1996. Collective and certification trademarks, geographical indications and unfair competition law are particularly attractive options, not only because they already enjoy wide international recognition, but they also, not having been conceived with individuals in mind, can benefit and be used by collectivities such as indigenous communities. Experience with existing mechanisms and standards is also a useful guide.

43. Many Committee participants have therefore asserted that current IP systems are useful, at least to some extent and in some cases, in meeting the needs of indigenous and traditional communities.³⁵ They have stated that existing standards and mechanisms should be used

³³ For example, criminal law has been used to protect performances against bootlegging, and penal sanctions are mentioned as one means of implementing the standards set out in the Phonograms Convention.

³⁴ European Community (WIPO/GRTKF/IC/1/13, paras. 20 and 165), Canada (WIPO/GRTKF/IC/1/13, paras. 46 and 166), Norway (WIPO/GRTKF/IC/1/13, para. 33), USA (WIPO/GRTKF/IC/1/13, para. 49), Poland (WIPO/GRTKF/IC/1/13, para. 156), the Asian Group (WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/2/16, para. 170).

³⁵ European Community (WIPO/GRTKF/IC/1/13, paras. 20 and 165), Canada (WIPO/GRTKF/IC/1/13, paras. 46 and 166), Norway (WIPO/GRTKF/IC/1/13, para. 33), USA

because experience with them are a helpful guide and because they offer immediate practical benefits (including international protection under existing treaties). For example, the Group of Latin American and Caribbean States (GRULAC) has noted that use of current IP laws is one option among several:

‘Many of the protection claims, needs and expectations expressed by the holders of genetic resources and traditional knowledge (including folklore) could be entirely or partly addressed by means of the systems and provisions currently available in the intellectual property field ... The resources offered by intellectual property have not been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them.’³⁶

44. Tradition-based creativity should also be encouraged and current IP protection for TCEs/EoF and derivative works should be made use of as far as possible by communities and their members. For example, the African Group has noted that the protection of TCEs/EoF should aim to, amongst other things, ‘protect and reward innovations and creative works derived from traditional knowledge and expressions of folklore’.³⁷

45. Many Committee participants have also argued that current IP systems are not entirely adequate or appropriate, and that they should be modified and/or *sui generis* systems should be established. Many participants have argued for the establishment of stand-alone *sui generis* systems.³⁸

46. It has also been argued that new measures and systems should first be tested at the national level,³⁹ and that they should be discussed, developed and implemented with the full and effective participation of affected indigenous peoples and traditional communities.⁴⁰

[Footnote continued from previous page]

(WIPO/GRTKF/IC/1/13, para. 49), Poland (WIPO/GRTKF/IC/1/13, para. 156), the Asian Group (WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/2/16, para. 170).

³⁶ WIPO/GRTKF/IC/1/5, Annex II, page 2.

³⁷ WIPO/GRTKF/IC/6/12. See also European Community (WIPO/GRTKF/IC/3/11.).

³⁸ Ethiopia (WIPO/GRTKF/IC/1/13, para. 50), Asian Group (WIPO/GRTKF/IC/2/16 para. 170), Thailand (WIPO/GRTKF/IC/2/16, para. 172). African Group (WIPO/GRTKF/IC/4/15, para. 62), Brazil (WIPO/GRTKF/IC/4/15, para. 63), Venezuela (WIPO/GRTKF/IC/4/15, para. 65), Colombia (WIPO/GRTKF/IC/4/15, para. 67), Russian Federation (WIPO/GRTKF/IC/4/15, para. 68), Iran (Islamic Republic of) (WIPO/GRTKF/IC/4/15, para. 69), Indonesia (WIPO/GRTKF/IC/4/15, para. 74), Morocco (WIPO/GRTKF/IC/4/15, para. 76), Egypt (WIPO/GRTKF/IC/4/15, para. 80), and Andean Community (WIPO/GRTKF/IC/4/15, para. 82) USA (WIPO/GRTKF/1/13, para. 49).

³⁹ See WIPO/GRTKF/IC/1/13, paragraph 87; WIPO/GRTKF/IC/2/16, paras. 75, 91, 117; Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10). See also WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/Folk/AFR/99/1) p.3; See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) pp. 80, 128, and 142; WIPO/GRTKF/IC/2/26, par. 152; WIPO/GRTKF/IC/2/16, par. 186. New Zealand (WIPO/GRTKF/IC/5/15, para. 41).

Proprietary and non-proprietary options

47. Exclusive property rights in TCEs/EoF, and IP-type mechanisms in general, should complement and be carefully balanced and coordinated with other non-proprietary and non-IP measures to reflect the characteristics of traditional forms and processes of creativity, the stakeholder interests involved, customary uses and practices associated with such forms and processes, and community social structures, practices and patterns.⁴¹ Exclusive private property rights in TCEs, even if held by communities, may run counter to the characteristics of traditional forms and processes of creativity and may induce unforeseen side-effects, such as competition within and between communities.

48. National legislative experiences are instructive. Among the many countries that have already enacted specific protection for TCEs/EoF, few provide for genuine exclusive property rights in TCEs/EoF: most aim rather at the regulation of their exploitation.⁴² Thus, IP-type property rights are not the only way to provide protection for TCEs. Comprehensive protection may require a range of proprietary and non-proprietary, including non-IP, tools. Non-proprietary approaches that have been used include unfair competition; equitable remuneration schemes; trade practices and marketing laws; contracts and licenses; registers, inventories and databases; customary and indigenous laws and protocols; cultural heritage preservation laws and programs; and handicrafts promotion and development programs (such as 'Seals of Excellence'). These are not mutually-exclusive options, and each may, working together, have a role to play in a comprehensive approach to protection. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

49. Existing laws for the protection of TCEs/EoF evidence a wide range of legal doctrines and mechanisms, which should inform the core principles regarding the scope of protection. Some extend a true exclusive right in TCEs/EoF as such. Many do not offer protection in the form of a true exclusive right, but rather focus on regulating use of the protected TCEs/EoF. These various options are not necessarily mutually exclusive, and could be combined, in conformity with the guiding principle of flexibility and comprehensiveness. One option may, for example, be more relevant or suited for a particular form of TCEs/EoF than another. Most *sui generis* systems include one, and often more than one, of these options, and comprehensive protection of TCEs/EoF may be afforded through more than one piece of legislation as well as through background common law and general legal codes. The range of existing approaches are, in sum:

⁴¹ For example, New Zealand (WIPO/GRTKF/IC/ 6/14, para. 41) and Saami Council (WIPO/GRTKF/IC/ 6/14, para. 57).

⁴² See WIPO/GRTKF/IC/ 3/10 and Lucas-Schloetter, 'Folklore' in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), page 291.

Exclusive property rights

50. Exclusive property rights give the right to authorize or prevent others from undertaking certain acts in relation to TCEs/EoF.⁴³ An exclusive rights approach would be one way of giving effect to a principle of ‘prior informed consent’. They are provided for, in varying formulations, in some of the laws that have implemented either the Tunis Model Law, 1976 or the Model Provisions 1982, and many of which assimilate TCEs/EoF to literary and artistic works or provide a form of protection closely analogous to copyright protection. Existing *sui generis* measures in copyright laws are, however, very diverse in their treatment of rights, and it would be difficult to codify their common elements⁴⁴ (see further below under B.5 ‘Scope of Protection’). In many cases, it is not always clear whether a true exclusive right is established by the legislation. However, here follow some examples of laws which contain, or seem to contain, an exclusive right:

(i) the Model Provisions provide in section 3:

“... the following utilizations of the expressions of folklore are subject to authorization by the [competent authority mentioned in Section 9, paragraph 1,] [community concerned]...”;

(ii) the Copyright Law of Senegal, 1973, as amended in 1986, provides that certain uses of TCEs/EoF “shall be subject to prior authorization by the [Copyright Office of Senegal]...”;

(iii) the Copyright Law of Nigeria, 1992 provides in section 29 that “Any person who, without the consent of the Nigerian Copyright Council, uses and expression of folklore in a manner not permitted by [the Act] shall be in breach of a statutory duty and be liable to the Council in damages, injunctions and any other remedies as the court may deem fit to award in the circumstances”;

(iv) the Pacific Regional Model, 2002 states that certain uses of TCEs/EoF require “the prior and informed consent” of the “traditional owners” (as defined);

(v) the Panama Law, 2000 establishes “collective indigenous rights” which may only be exercised “by those natural persons or legal entities, private or public, that the [indigenous peoples] have duly authorized by an instrument, agreement or express authorization in which it is specified that the collective rights are granted under a license contract for use” (article 5, Rules for Use of Collective Rights, Decree, No. 12, 2001);

⁴³ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2 and Annex II, p. 5), Zambia (WIPO/GRTKF/IC/1/13, para. 38)

⁴⁴ See and compare, for example, the laws of Algeria, Angola, Benin, Burkina Faso, Cameroon, Congo, Ghana, Ivory Coast, Djibouti, Gabon, Guinea, Lesotho, Malawi, Mali, Morocco, Nigeria, Qatar, Republic of Central Africa, Senegal, Sri Lanka, Togo, and Tunisia. See WIPO/GRTKF/IC/3/10, as well as Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), pp. 286 to 291, where existing copyright-based systems are extensively analyzed and compared. Also, Kuruk, P., “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,” 48 *American University Law Review* 769 (1999).

(vi) the Tunisian Copyright Act, 1994 provides that “any transcription of folklore with a view to exploitation for profit shall require authorization from the Ministry responsible for culture ... Authorization from the Ministry responsible for culture shall also be required for the production of works inspired by folklore for the full or partial assignment of copyright in a work inspired by folklore or for an exclusive license with respect to such work” (section 7).

Entitlements under a scheme for equitable remuneration/compensatory liability

51. Equitable remuneration (compulsory licensing or compensatory liability schemes) provide for some form of equitable return to the rightsholders for use of their TCEs/EoF, without creating an exclusive right in the TCEs/EoF. This approach has been used in some systems for protection of TCEs/EoF, often through a *domaine public payant* system.⁴⁵ For example, in the Bangui Agreement of OAPI, as amended in 1999, expressions of folklore and works that have fallen into the public domain are subject to “*domaine public payant*” (Section 59). The exploitation of expressions of folklore and that of works or productions that have fallen into the public domain on expiry of the terms of protection are subject to the user entering into an undertaking to pay to the national collective rights administration body a relevant royalty. Royalties collected with respect to the exploitation of expressions of folklore are devoted to welfare and cultural purposes.

Moral rights protection

52. Moral rights normally comprise the rights: of attribution of ownership; not to have ownership falsely attributed; not to have the protected materials subjected to derogatory treatment; and, at least in some jurisdictions, the right to publish or disclose (the right to decide if, when and how the protected materials ought to be made accessible to the public⁴⁶). Protection of moral rights is found in the Model Provisions, 1982 and the Pacific Regional Model, 2002 (and, in relation to performances of TCEs/expressions of folklore, in the WPPT, 1996). Moral rights protection is obligated by the Berne Convention, 1971 and most copyright and related rights laws already provide moral rights protection for literary and artistic works, or they are provide for through another law or measure. Article 6bis of the Berne Convention provides as follows:

“1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of

⁴⁵ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2 and Annex II, p. 5), Bangui Agreement of OAPI, see WIPO/GRTKF/IC/5/INF 3.

⁴⁶ *Droit de divulgation*; prominent in French law but not part of the moral rights in the Berne Convention; see Stewart, ‘International Copyright and Neighbouring Rights’, p. 73. Also, Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), p. 298.

the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.”

53. The WPPT, 1996 provides, for the first time in a multilateral instrument, moral rights of identity and integrity to performers. Article 5 of the WPPT provides as follows:

“1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with [paragraph \(1\)](#) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.”

54. A number of *sui generis* systems for protection of TCEs/EoF provide for one or more of the moral rights. For example:

(i) the Model Provisions, 1982 states in section 5(1) that “In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.” Failure to comply with this section is a criminal offence (section 6);

(ii) the Copyright Act of Nigeria, 1992, states that “In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, and in conformity with fair practice, by mentioning the community or place from where the expression utilized has been derived” (section (28(3)));

(iii) the Pacific Regional Model, 2002 provides exceptions in respect of which it is not necessary to obtain the consent of the ‘traditional owners’. In respect of such ‘free uses’, however, the user of the TCE/EoF ‘must make sufficient acknowledgement of the traditional owners by mentioning them and/or the geographical place’ from which the TCE/EoF originated. In addition, section 13 of the Pacific Regional Model states, for example, as follows:

- “(1) The traditional owners of traditional knowledge or expressions of culture are the holders of the moral rights in the traditional knowledge or expressions of culture.
- (2) The moral rights of the traditional owners of traditional knowledge and expressions of culture are:
- the right of attribution of ownership in relation to their traditional knowledge and expressions of culture; and
 - the right not to have ownership of traditional knowledge or expressions of culture falsely attributed to them; and
 - the right not to have their traditional knowledge and expressions of culture subject to derogatory treatment;
- (3) The moral rights of traditional owners in their traditional knowledge and expressions of culture exist independently of their traditional cultural rights.
- (4) Moral rights continue in force in perpetuity and are inalienable, and cannot be waived or transferred.”

Unfair competition approach

55. An unfair competition approach, providing a right to prevent various acts that constitute ‘unfair competition’ broadly speaking, such as misleading and deceptive trade practices, unjust enrichment, passing off and taking of undue commercial advantage.⁴⁷ For example:

(i) common law remedies for passing off, unjust enrichment and the like, as well as trade practices and labelling legislation can often already provide the desired protection. Janke reports on several examples in her ‘Minding Culture’ studies. A specific example is provided by another recent case under trade practices law in Australia: in 2003 a company was prevented from continuing to describe or refer to its range of hand painted or hand carved Indigenous oriented souvenirs as ‘Aboriginal art’ or ‘authentic’ unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent. Proceedings were instituted against the company because it represented that some of its hand painted Aboriginal-style souvenirs were ‘authentic,’ ‘certified authentic’ and/or ‘Australian Aboriginal art,’ and it was held that these representations were likely to mislead consumers because the majority of the pool of artists who produced the souvenirs were not Aboriginal or of Aboriginal descent;⁴⁸

(ii) specific legislation of this nature, aimed directly at TCEs/EoF, can also provide a useful remedy. An example is the Arts and Crafts legislation of the U.S.A, which protects Native American artisans by assuring them the authenticity of Indian artifacts under the authority of an Indian Arts and Crafts Board. The IACA, a “truth-in-marketing” law, prevents the marketing of products as “Indian made” when the products are not made by Indians as they are defined by the Act;⁴⁹

(iii) in the Model Provisions, 1982, protection against misleading acts that could constitute ‘unfair competition’ is provided by means of treating such acts as criminal offences (see below).

⁴⁷ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2).

⁴⁸ See further WIPO/GRTKF/IC/5/3 and <<http://www.accc.gov.au/>> (April 7, 2003).

⁴⁹ WIPO/GRTKF/IC/3/10, par. 122 (i).

A penal sanctions (criminal law) approach

56. A penal sanctions approach, where certain acts and omissions are treated as criminal offences, is found in, for example:

(i) the Model Provisions, 1982, provide that willful (or negligent, as an additional option) failure to acknowledge the source, utilization of TCEs/EoF without authorization, deception in respect of the source of TCEs, presenting artifacts or the like as expressions of folklore of a certain community, from where, in fact, they have not been derived, and distortion of TCEs/EoF in a way prejudicial to the cultural interests of the community concerned, should be criminal offences (section 6(1));

(ii) the Pacific Regional Model provides for certain criminal offences. For example, it provides:

“26 Offence in relation to traditional cultural rights

If:

- (a) a person makes a non-customary use of traditional knowledge or an expressions of culture (whether or not such use is of a commercial nature); and
- (b) the traditional owners have not given their prior and informed consent to that use; the person is guilty of an offence punishable on conviction by a fine not exceeding an amount equivalent to [*Enacting country to determine*] or a term of imprisonment not exceeding [*Enacting country to determine*] years, or both.”

It also provides offences in relation to moral rights (section 27), to sacred-secret material (section 28) and to importation and exportation (section 29)

B. LEGAL ELEMENTS OF PROTECTION OF TCES/EOF

57. This section sets out the specific legal provisions that have been developed and used in national and regional laws and legal systems, corresponding in general to the substantive specific principles, describing the legal essence of protection, that are suggested in WIPO/GRTKF/IC/7/3.

B.1 Scope of subject matter

58. Document WIPO/GRTKF/IC/7/3 suggested the following principle:

‘Scope of subject matter

(a) ‘Traditional cultural expressions’ or ‘expressions of folklore’ may be understood as including productions consisting of characteristic elements of the traditional cultural heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of such a community. Such productions may include, for example, the following forms of expressions, or combinations thereof:

- (i) verbal expressions, such as folk tales, folk poetry and riddles; aspects of language such as words, signs, names, symbols and other indications;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) tangible expressions, such as:
 - (a) productions of folk art, in particular, drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, handicrafts, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - (c) architectural forms.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.’

Discussion of options and mechanisms

59. Several delegations have pointed to the desirability of clarity on the scope of ‘TCEs/EoF’.⁵⁰ Therefore, a specific proposal, above, was made in WIPO/GRTKF/IC/7/3, as a possible basis for ongoing discussion and the development of a core principle or principles.

60. However, many international IP standards defer to the national level for determining the precise scope of protected subject matter. This practice also conforms with the principles of flexibility and of responsiveness to the aspirations and expectations of relevant communities. Existing laws show diversity in the terms used to refer to this subject matter, and this practice should also be continued – noting, also, that ‘folklore’ is widely used in existing laws and instruments, but that some communities prefer to avoid this term. The question of terminology was extensively surveyed in document WIPO/GRTKF/IC/3/9. Existing and draft regional and national laws, as well as relevant international instruments, could be drawn upon

⁵⁰ At the sixth session for example, the USA (WIPO/GRTKF/IC/6/14, para. 35), the Islamic Republic of Iran (WIPO/GRTKF/IC/6/14, para. 36), Switzerland (WIPO/GRTKF/IC/6/14, para. 37), Nigeria (WIPO/GRTKF/IC/6/14, para. 43), Russia (WIPO/GRTKF/IC/6/14, para. 45), International Publishers Association (WIPO/GRTKF/IC/6/14, para. 65).

to modify or further develop this description.⁵¹ In addition, it may be desirable in due course, given the particular attention paid to handicrafts, to work with a specific description or definition of ‘handicrafts’.⁵²

61. Existing and draft regional and national laws, as well as relevant international instruments, for example, contain descriptions of protected TCE-subject matter such as the following:

(i) the Model Provisions, 1982, describe the protected subject matter as follows:

‘For the purposes of this [law], “expressions of folklore” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- verbal expressions, such as folk tales, folk poetry and riddles;
- musical expressions, such as folk songs and instrumental music;
- expressions by action, such as folk dances, plays and artistic forms or

rituals;

whether or not reduced to a material form; and

- tangible expressions, such as:

- (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
- (b) musical instruments;
- (c) [architectural forms].’;

(ii) the Indigenous Peoples Rights Act, 1997 of the Philippines provides protection for “community intellectual property rights” described as:

(a) the past, present and future manifestations of their [indigenous cultural communities and indigenous peoples] cultures, such as but not limited to, archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as religious and spiritual properties;

(b) science and technology including but not limited to, human and other genetic resources, seeds, medicines, health practices, vital medicinal plants, animals, minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, and scientific discoveries; and

(c) language, music, dance, script, histories, oral traditions, conflict resolution mechanisms, peace building processes, life philosophy and perspectives and teaching and learning systems.⁵³

⁵¹ See for example the laws of Panama, the Pacific Island countries, the draft law of China (WIPO/GRTKF/IC/6/14, para. 32) and others. See WIPO/GRTKF/IC/5/INF 3.

⁵² See, for example, Chapter 2, ITC/WIPO, ‘Marketing of Crafts and Visual Arts: The Role of Intellectual Property – A Practical Guide’.

⁵³ Section 10, Rule VI, Rules and Regulations Implementing Republic Act No. 8371.

The Pacific Regional Model describes the protected subject matter, expressions of culture, as any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, including:

- (a) names, stories, chants, riddles, histories and songs in oral narratives; and
- (b) art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewelry, weaving, needlework, shell work, rugs, costumes and textiles; and
- (c) music, dances, theatre, literature, ceremonies, ritual performances and cultural practices; and
- (d) the delineated forms, patterns and details of designs and visual compositions; and
- (e) architectural forms.

(iii) in the Tunis Model, ‘folklore’ means “all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage”;

(iv) the USA, the Arts and Crafts Act applies to ‘Indian products’ (see further below under ‘Criteria for protection’);

(v) Panama’s *sui generis* regime covers indigenous peoples’ creations, such as inventions, designs and innovations, cultural historical elements, music, art and traditional artistic expressions;

(vi) Decision 486 on the Biological and Genetic Heritage and Traditional Knowledge (Andean Community)⁵⁴ also provides protection for “the name of indigenous, African American, or local communities, or of such denominations, words, letters, characters, or signs as are used to distinguish their products, services or methods of processing, or that constitute an expression of their culture or practice...”

62. The numerous countries which provide *sui generis* protection for TCEs/EoF in their copyright laws (reported on in WIPO/GRTKF/IC/3/10) each contain descriptions of the protected subject matter based in general upon the Tunis Model Law, 1976 or the Model Provisions, 1982. Yet, there are differences between them. WIPO/GRTKF/IC/ 3/9 surveyed many of these laws, and only a few examples are provided here:

(i) in Malawi, the Copyright Act, 1989, states that “folklore” means all literary, dramatic, musical and artistic works belonging to the cultural heritage of Malawi created, preserved and developed by ethnic communities of Malawi or by unidentified Malawi authors (section 2);

(ii) in Lesotho, the Copyright Order of 1989 provides that “expressions of folklore” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained over generations by a community or by individuals reflecting the traditional artistic expectations of their community (section 2);

54 Decision 486 Common Intellectual Property Regime (Non official translation).

(iii) in Nigeria, section 28(5) of the Copyright Act, 1992 provides that “folklore” means a group – oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of his cultural and social identity, its standards and values as transmitted orally, by imitation or by other means including –

- (a) folklore, folk poetry, and folk riddles;
- (b) folk songs and instrumental folk music;
- (c) folk dances and folk plays;
- (d) productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles;

(iv) in Tunisia, the Law of 1994 on Literary and Artistic Property states in Article 7 that ‘Folklore forms part of the national heritage. Folklore within the meaning of this Law shall be any artistic heritage bequeathed by preceding generations and bound up with customs and traditions and any aspect of folk creation such as folk stories, writings, music and dance’;

(v) in Panama, the Law on Copyright and Neighboring Rights and Enacting Other Provisions, 1994 states in Article 2.11 that “expressions of folklore” means productions of characteristic elements of the traditional cultural heritage, constituted by the whole store of literary and artistic works created on the national territory by unknown or unidentified authors presumed to be nationals or to belong to the country’s ethnic communities, and which are handed down from the traditional artistic or literary aspirations of a community;

(vi) in Bolivia, the Law on Copyright of 1992 provides, in article 21, that ‘... folklore being understood in the strict sense of the body of literary and artistic works created within the national territory by unknown or unidentified authors presumed to be nationals of the country or of its ethnic communities, which are handed down from generation to generation and thereby constitute one of the fundamental elements of the traditional cultural heritage of the nation’;

(vii) in Benin, the Law on the Protection of Copyright of 1984, states in article 10 that “Folklore shall mean all literary, artistic, religious, scientific, technological and other traditions and productions created by the national communities, passed on from generation to generation and thus constituting the basic elements of the national cultural heritage.” The descriptions in the copyright laws of Angola, Congo, Burundi, Guinea, Kenya and Mali are similar;

(viii) in Cameroon, the Law on Copyright of 1990 states in section 10 that folklore means ‘all productions involving aspects of traditional cultural heritage, produced and perpetuated by a community or by individuals who are clearly responding to the expectations of such community, comprising particularly folk tales, folk poetry, popular songs and instrumental music, folk dances and shows, as well as artistic expressions, rituals and productions of popular art;’

(ix) in Ghana, the Copyright Law of 1985 states in section 53 that (...) folklore means all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana by unidentified Ghanaian authors, and any such works designed under this Law to be works of Ghanaian folklore;

(x) in Côte d'Ivoire, the Law on the Protection of Intellectual Works of 1978 states that folklore means all literary and artistic productions, passed from generation to generation, which form part of the traditional cultural heritage of the Côte d'Ivoire, the identity of whose author is unknown, but where there is every reason to presume him to be a national of the Côte d'Ivoire. Works derived from folklore means any work composed of elements borrowed from the traditional cultural heritage of the Côte d'Ivoire;

(xi) in Senegal, the Copyright Act, 1973 states that folklore means all literary and artistic works created by authors presumed to be Senegalese nationality, passed from generation to generation and constituting one of the basic elements of the traditional Senegalese cultural heritage. A work inspired by folklore means work composed exclusively of elements borrowed from the Senegalese traditional cultural heritage;

(xii) in Togo, the Law on the Protection of Copyright, Folklore and Neighboring Rights of 1991 states that folklore is an original component of the national heritage, and consists of all literary and artistic products created on the national territory by anonymous, unknown or forgotten authors presumed to be Togolese nationals or ethnic communities, handed down from generation to generation and constituting one of the fundamental elements of the national cultural heritage;

(xiii) in Sri Lanka, the Code of Intellectual Property Act, 1979 as amended up to 1990, states that ... folklore means all literary and artistic works created in Sri Lanka by various communities, passed on from generation to generation and constituting one of the basic elements of traditional cultural heritage;

(xiv) in Barbados, the Copyright Act, 1981-1982, describes, in Section 13, folklore as all literary and artistic works that (a) constitute a basic element of the traditional and cultural heritage of Barbados, (b) were created in Barbados by various groups of the community, and (c) survive from generation to generation.

63. Descriptions and definitions of TCE-related subject matter contained and used in certain multilateral instruments, organizations and processes also provides material from which options on the scope of protected subject matter can be developed:

(i) the "Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples" developed under the Auspices of the United Nations (UN) Working Group on Indigenous Populations⁵⁵ 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 peoples which may be created or rediscovered in the future based upon their heritage' and '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;

55 UN document number E/CN.4/Sub.2/1994/31

human remains; immovable cultural property such as sacred sites of cultural, natural and historical significance and burials;’

(ii) the United Nations (UN) Draft Declaration on the Rights of Indigenous Peoples⁵⁶ states in Article 29 that: “Indigenous people are entitled to the recognition of the full ownership, control, and protection of their cultural and intellectual property. They have the right to special measures to control, develop, and protect their sciences, technologies, and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, and visual and performing arts,”

(iii) the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of November 15, 1989 provides as follows: “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.”

64. Many national laws dealing with arts and crafts promotion contain definitions of ‘arts and crafts’, ‘handicrafts’, ‘craft products’, ‘artisanal products’ and similar terms. The ITC (Unctad and WTO) and WIPO guide ‘Marketing Crafts and Visual Arts: the Role of Intellectual Property’ contains relevant definitions too. These could all be drawn from to establish a definition for IP protection purposes.

Choice of term(s)

65. WIPO/GRTKF/IC/3/9 surveyed the range of terms used in international, regional and national laws relating to ‘traditional knowledge’, used there in its widest sense to include both TK *stricto sensu* and cultural expressions. Terms of particular proximity to TCE-subject matter include: Aboriginal Tradition; Cultural Patrimony; Folklore; Expressions of Folklore; Cultural Heritage; Cultural Property; Indigenous Heritage (Rights); Indigenous Cultural and Intellectual Property (Rights); Indigenous Intellectual Property; Customary Heritage Rights; Popular Culture; Arts and Crafts, Handicrafts; Craft Products; Artisanal Products; the Intangible Component.

56 UN document number SUB/COM/RES 1994/45

B.2 Criteria for protection

66. WIPO/GRTKF/IC/7/3 suggested the following principle:

‘Criteria for protection

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

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

Discussion of options and legal mechanisms

67. The Committee’s discussions have clarified the distinction between the notion of TCEs/EoF in general, and those TCEs/EoF that are eligible for protection under a specific legal measure. Laws typically achieve this by stipulating the substantive criteria that TCEs/EoF should display in order to be protectable.

68. The suggested principle aims at providing some objective legal or practical criterion by which imitations, as opposed to ‘authentic’ TCEs/EoF, can be identified. Such a criterion would be practically useful in implying a clear and ongoing link between the TCE/folklore and an identifiable indigenous, traditional or other cultural community. It would also articulate the often collective and communal nature of TCEs/EoF. A broader conception of equity and the repression of unfair practices would suggest a focus on those TCEs/EoF that are linked with, maintained by and are distinctively associated with specific communities. ‘Authenticity’ as such is a contested term in folkloristics, and its use in international and national processes has been problematic.⁵⁷ Yet, at least in so far as it connotes ‘actual character’, ‘genuine’ and ‘not false or an imitation’⁵⁸, it begins to edge towards being an appropriate criterion establishing the desired linkage between the TCE/EoF and a community (or that the TCE/EoF is an ‘attribute’ of a particular community).

69. Most if not all current systems for the protection of TCEs/EoF establish a criterion seeking to establish some form of linkage between the TCE/EoF and the community. Criteria may differ but they all seek to distinguish somehow between ‘authentic’ and ‘non-authentic’ TCEs/EoF. The following are examples of how such a criterion has been articulated in international, regional and national laws and instruments to date:

⁵⁷ See, generally, discussions at ‘Folklore, Aesthetic Ecologies and Public Domain’, University of Pennsylvania, April 2 and 3, 2004 and 8th Congress of Societe Internationale d’Ethnologie et de Folklore/3rd Congress Association d’Anthropologie Mediterraneenne, Marseille, April 28, 2004; Personal communications with, amongst others, Professor Dorothy Noyes, Associate Professor of Folklore, Ohio State University and Valdimar Hafstein, Researcher, Reykjavik Academy, Iceland and Adjunct Lecturer in Ethnology and Folklore, University of Iceland.

⁵⁸ See for example Merriam-Webster Dictionary and Concise Oxford Dictionary.

(a) the USA's Indian Arts and Crafts Act provides protection only to arts and crafts that are 'Indian products'. 'Indian products' are in turn defined with reference almost exclusively to the identity of their maker (the 'labor component' of the product must be 'Indian'). A product is an 'Indian product' if the maker is a member of an 'Indian tribe' or has been certified as an Indian artisan by such a tribe. In particular, the Act deals with the question of criteria as follows:

"Indian products" - any art or craft product made by an Indian (term "made by an Indian" means that an Indian has provided the artistic or craft work labor necessary to implement an artistic design through a substantial transformation of materials to produce the art or craft work. This may include more than one Indian working together). The labor component of the product, however, must be entirely Indian for the Indian art or craft object to be an "Indian product." (Section 309.2 (d) P.L. 101-497)

"Indian product" includes, but is not limited to:

- (i) Art made by an Indian that is in a traditional or non-traditional style or medium;
- (ii) Craft work made by an Indian that is in a traditional or non traditional style or medium;
- (iii) Handcraft made by an Indian (i.e. an object created with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product). (Section 309.2 (2) P.L. 101-497)

Examples of non-qualifying products. An "Indian product" under the Act does not include any of the following, for example:

- (i) A product in the style of an Indian art or craft product made by non-Indian labor;
- (ii) A product in the style of an Indian art or craft product that is designed by an Indian but produced by non-Indian labor;
- (iii) A product in the style of an Indian art or craft product that is assembled from a kit;
- (iv) A product in the style of an Indian art or craft product originating from a commercial product, without substantial transformation provided by Indian artistic or craft work labor;
- (v) Industrial products, which for this purpose are defined as goods that have an exclusively functional purpose, do not serve as a traditional artistic medium, and that do not lend themselves to Indian embellishment, such as appliances and vehicles. An industrial product may not become an Indian product.
- (vi) A product in the style of an Indian art or craft product that is produced in an assembly line or related production line process using multiple workers not all whom are Indians. (For example, if twenty people make up the labor to create the product(s), and one person is not Indian, the product is not an "Indian product.") (Section 309.2 (3) P.L. 101-497)

"Commercial product can become an Indian product when the Indian labor expended to the craft work or object is sufficient to substantially transform the qualities and appearance of the original commercial item Section 309.6 P.L. 101-497

"How can an individual be certified as an Indian artisan?"

- (a) In order for an individual to be certified by an Indian tribe as a non-member Indian artisan for purposes of this part-

(1) The individual must be of Indian lineage of one or more members of such Indian tribe; and

(2) The certification must be documented in writing by the governing body of an Indian tribe or by a certifying body delegated this function by the governing body of the Indian tribe.

(b) As provided in section 107 of the Indian Arts and Crafts Act of 1990, Public Law 101-644, a tribe may not impose a fee for certifying an Indian artisan” (Section 309.4 P.L. 101-497)”

(b) Australia’s Label of Authenticity, reported by Janke, may be used only by ‘Certified Indigenous Creators’, as defined;⁵⁹

(c) the Toi Iho™ ‘Maori Made’ mark of New Zealand, a registered trade mark ‘of authenticity and quality for Maori arts and crafts’, is licensed to artists of “Maori descent to be used on works produced by them which comprise an explicit or implicit Maori referent...”⁶⁰

70. The essence of a TCE/expression of folklore is that it represents, identifies and is recognized as characteristic of the traditional heritage of a particular community. This suggests that, to be protectable, TCE subject matter should be ‘characteristic’ of a distinct traditional heritage of a particular community. Once again, examples of how such a criterion has been expressed in practice are (almost all of the copyright laws cited above under ‘Scope of subject matter’ contain some similar criterion; only one or two of those examples are repeated here):

(i) the Model Provisions, 1982 apply to productions consisting of ‘characteristic elements of the traditional artistic heritage section developed and maintained by a community...’;

(ii) the Tunis Model Law, 1976 includes a requirement that the TCEs/EoF consist of ‘basic elements’ of the heritage of a particular community;

(iii) the Law of Panama, 2000 and the associated Executive Decree of 2001 provide that the protected subject matter must be based upon ‘tradition’ and ‘collective’, meaning that the subject matter must, amongst other things, constitute the heritage of an entire indigenous people, or must be regarded as belonging to one or more of the indigenous communities of Panama;

(iv) the Pacific Regional Model provides that the TCEs/EoF must be ‘traditional’, meaning that the TCEs/EoF must have been created for traditional purposes, be inter-generational, pertain to a particular group and be collectively held;

(v) in Tunisia, Law No. 94-36 of 1994 on Literary and Artistic Property states in Article 7 that ‘Folklore forms part of the national heritage. Folklore within the meaning of this Law shall be any artistic heritage bequeathed by preceding generations and bound up with customs and traditions and any aspect of folk creation such as folk stories, writings, music and dance;

⁵⁹ Janke, Terri, ‘Minding Culture’, pages 134 to 158.

⁶⁰ Rules Governing Use by Artists of the Toi Iho Maori Made Mark, at www.toiio.com (August 18, 2004).

(vi) in Nigeria, section 28(5) of the Copyright Act, 1992 provides that “folklore” means a group – oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of his cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.

B.3 Beneficiaries

71. WIPO/GRTKF/IC/7/3 suggested the following principle:

<p>‘Beneficiaries</p> <p>Measures for the protection of TCEs/EoF should be for the benefit of the indigenous peoples and traditional and other cultural communities:</p> <p>(i) in whom the custody and protection of the TCEs/EoF are entrusted in accordance with the customary law and practices of that community; and</p> <p>(ii) who maintain and use the TCEs/EoF as being characteristic of their traditional cultural heritage.’</p>

Discussion of options and legal mechanisms

72. Many Committee participants have emphasized that TCEs are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals⁶¹ (conforming with the principles of responsiveness to the aspirations of relevant communities and of recognition of the specific characteristics and forms of cultural expression). It may be necessary to clarify the allocation of rights or distribution of benefits among communities which share the same or similar folklore in the same country or in different countries (so-called ‘regional folklore’).

Recognizing communal rights and benefits

73. There are various ways in which such a principle could be achieved in practice. Specific rights may be granted directly to communities and/or rights may be vested in an office, agency other authority which is obliged to exercise the rights in close consultation with and for the benefit of relevant communities. Precedents for group-rights protection can be found in existing copyright standards concerning anonymous, unpublished, joint and collective works,⁶² and in related non-IP policy areas, including cultural properties and heritage laws (such as the Native American Graves Protection and Repatriation Act (NAGPRA), 1990; the Law on the Protection of Cultural Assets of the Republic of Korea, 1962; and, the Law on the Protection and Preservation of Cultural Goods of Croatia, 1999). Drawing from *sui generis* and copyright laws for the specific protection of TCEs/EoF, the following examples are mentioned among others:

(a) the beneficiaries of the USA Indian Arts and Crafts Act, 1990 are ‘Indian tribes’, Indian arts and crafts organizations and individual Indians, as defined;

(b) the Law of Panama, 2000 and the associated Executive Decree of 2001 vests collective rights in indigenous Congress(es) or Traditional Indigenous Authority(ies);

⁶¹ GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5), SAARC (WIPO/GRTKF/IC/1/13, para. 26), Indonesia (WIPO/GRTKF/IC/1/13, para. 29).

⁶² See Article 15, Berne Convention, 1971.

(c) the Philippines Law, 1997 provides recognition, respect and protection for and of the rights of the indigenous cultural communities and indigenous peoples (referred to as “ICCs/IPs”). This is provided by Section 34 of the Act which states that:

“Indigenous cultural communities/indigenous peoples are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of flora and fauna, oral traditions, literature, designs and visual and performing arts.”

(d) the Model Provisions, 1982 provides that rights may be granted directly to a community or to a competent authority. Section 3 states: ‘... the following utilizations of the expressions of folklore are subject to authorization by the [competent authority mentioned in Section 9, paragraph 1,] [community concerned]...’;

(e) the Pacific Regional Framework, 2002 vests ‘traditional cultural rights’ in ‘traditional owners,’ defined as the group, clan or community of people, or an individual who is recognized by a group, clan or community of people as the individual, in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community;’

(f) specific *sui generis* provision within copyright legislation could also provide for communal rights. Australia is, for example, developing legislation to grant communities ‘legal standing’ to exercise moral rights to protect against inappropriate, derogatory or culturally insensitive use of tradition-based copyright material;⁶³

(g) communal beneficiaries can also be recognised in case-law. As an example, courts in Australia have been prepared to recognize communal interests in a copyright work;⁶⁴

(h) rights are vested in a statutory body under the Tunis Model Law, 1976 and this is also an option under the Model Provisions, 1982, as noted above. Thus, most of the national laws which have followed these models vest rights in the State or a statutory body, or at least provide that the rights should be managed and exercised by the State. In most of these cases, proceeds from the granting of such rights are applied towards national heritage, social welfare and culture-related programs. The African Group’s submission made at the sixth session of the Committee stated as one of its Principles, ‘Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.’⁶⁵ For example:

⁶³ WIPO/GRTKF/IC/5/15, para. 131.

⁶⁴ See Janke, Terri, ‘Minding Culture – The Protection of Traditional Cultural Expressions’, WIPO.

⁶⁵ WIPO/GRTKF/IC/6/12.

- the Copyright Law of Nigeria, 1992 states that ‘The right to authorize [use of folklore as provided for in the Act] shall vest in the Nigerian Copyright Commission.’ (section 28(4));
- the Copyright Law of Tunisia, 1994 states that “folklore forms part of the national heritage and any transcription of folklore with a view to exploitation for profit shall require authorization from the Ministry responsible for culture against payment of a fee for the benefit of the welfare fund of the Copyright Protection Agency established pursuant to this Law. Authorization from the Ministry responsible for culture shall also be required for the production of works inspired by folklore for the full or partial assignment of copyright in a work inspired by folklore or for an exclusive license with respect to such work” (section 7).

B.4 Management of rights

74. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

‘Management of rights

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

(b) Authorizations required to exploit TCEs/EoF should be obtained either directly from the community concerned or the authority acting on behalf of and in the interests of the community. Where authorizations are granted by the authority:

(i) such authorizations should be granted only after appropriate consultations with the relevant indigenous people/s or traditional or other community/ies, in accordance with their traditional decision-making and governance processes;

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

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

(iv) any monetary or non-monetary benefits collected by the authority for the use of the TCEs/EoF should be provided directly by the authority to the indigenous people or traditional or other community concerned;

(v) enabling legislation, regulations or administrative measures should provide guidance on matters such as procedures for applications for authorization; fees, if any, that the authority may charge for its services; public notification procedures; the resolution of disputes; and, the terms and conditions upon which authorizations may be granted by the authority.’

Discussion of options and legal mechanisms

75. This suggested principle seeks to address the need to clarify how authorizations to use TCEs are applied for, to whom applications are addressed, public notification, identification of beneficiaries and allocation of benefits, how disputes are resolved, and similar issues. These should apply regardless of whether communities or State appointed bodies are the beneficiaries of protection (see ‘Beneficiaries’ above). Some existing laws have detailed

provision for management of rights and the processing of applications for authorization (such as the Pacific Regional Model). Existing examples suggest a possible role of an ‘authority’ established by the State, at least in some circumstances, to: grant authorizations to use TCEs/EoF, monitor uses of TCEs/EoF to ensure that these are appropriate (especially where the focus is on regulation of their use and not on an exclusive property right); advise and assist relevant communities; resolve disputes as to ownership and benefit-sharing; raise awareness of the need to respect and protect TCEs/EoF; institute civil or criminal proceedings on behalf of communities if needed. Where some form of notification system is adopted (see ‘Formalities’ below), such an authority could also maintain it. Many countries already have offices, boards, agencies and other authorities performing these or similar functions.

76. While WIPO/GRTKF/IC/ 7/3 sought to establish a core principle that should apply, clearly the practical elaboration of such a principle will depend greatly on community factors: options for more detailed provisions could be further developed at the national and community levels, but some initial examples are:

(a) for example, the Model Provisions, 1982 provides that rights may be granted directly to a community or to a competent authority. Section 3 states: ‘... the following utilizations of the expressions of folklore are subject to authorization by the [competent authority mentioned in Section 9, paragraph 1.] [community concerned]...’. They provide guidance on how authorizations should be applied for and obtained. They make provision for written or oral applications, as well as individual and blanket licenses (article 10). They do not give any guidance as regards the information any application for authorization has to contain, nor provisions concerning the process of granting the authorization. Paragraph 2 of article 10 allows, but does not make mandatory, the collecting of fees for authorizations, and also deals with the purpose for which the collected fees must be used. It offers a choice between the promoting or safeguarding of national culture or of national folklore. Paragraph 3 of article 10 provides that any decision of the competent authority is appealable. The decisions of a community are not subject to appeal;

(b) the Tunis Model Law requires that rights in folklore shall be exercised by a Government appointed authority (section 6);

(c) many States (based upon the Tunis Model Law, 1976 and the Model Provisions, 1982) designate a statutory body as the holder of the rights in TCEs and empower that body to grant authorizations for use.⁶⁶ For example, under the Tunisian Copyright Act, 1994 “... any transcription of folklore with a view to exploitation for profit shall require authorization from the Ministry responsible for culture against payment of a fee for the benefit of the welfare fund of the Copyright Protection Agency established pursuant to this Law” (section 7). In the Nigerian Copyright Act, 1997, the right to authorize acts in relation to folklore vest in the Nigerian Copyright Commission (section 28);

(d) the Peru Law, 2002 provides for the registration of license contracts entered into under the law and directs matters such as the contents of the contracts.⁶⁷ Provision is also

⁶⁶ See responses to folklore questionnaire and WIPO/GRTKF/IC/3/10, and GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5).

⁶⁷ Articles 25 to 33.

made for a ‘Competent National Authority’ and an ‘Indigenous Knowledge Protection Board’, each having various specific duties;

(e) the Pacific Regional Model, 2002 provides for prior informed consent and for the establishment of a ‘Cultural Authority’, to which application must be made by a prospective user of a TCE to obtain the prior and informed consent of the ‘traditional owners’.⁶⁸ The authority acts in the interests of the relevant communities and mediates between the communities and users. The authority, referred to as a ‘Cultural Authority’, receives applications from prospective users of a TCE to obtain the prior and informed consent of the ‘traditional owners’. The authority has *inter alia* to identify the ‘traditional owners’ and to resolve uncertainties or disputes as to ownership and oversee the conclusion of ‘authorized user agreements’ between the user and the traditional owners. Disputes as to ownership must be resolved according to customary law or other means. If no ‘traditional owners’ can be found or there is no agreement as to ownership, the cultural authority can be determined to be the traditional owner. This model also specifies the information that applications for authorization must contain and the terms and conditions that the authorized user agreement should contain;⁶⁹

(f) the Indian Arts and Crafts Act, 1990 of the USA vests various rights and responsibilities in an ‘Indian Arts and Crafts Board’, which has been in existence since 1935 under earlier legislation. Its main function is to implement the Act and it is empowered to provide various forms of assistance to Indian tribes. Although Indian tribes, Indian arts and crafts organisations and individual Indians have a right to bring civil suit under the Act, the Board can also receive complaints and act upon them, including by way of referring criminal matters to the Federal Bureau of Investigation and the US Attorney General;

(g) furthermore, existing collective management organizations (CMOs) are potentially the most practical means of administering rights in TCEs. Committee participants⁷⁰ and CMOs themselves⁷¹ have expressed interest in exploring this possibility further.

B.5 Scope of protection

77. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

<p>‘Scope of protection</p> <p>There shall be adequate measures to ensure:</p> <p>(i) the prevention of: the reproduction, adaptation, public communication and other such forms of exploitation of; any distortion, mutilation or other modification of, or other derogatory action in relation to; and the acquisition by third parties of IP rights over, TCEs/EOF of particular cultural or spiritual value or significance (such as sacred TCEs/EOF), and derivatives thereof;</p> <p>(ii) the prevention of the unauthorized disclosure and subsequent use of and acquisition by third parties of IP rights over secret TCEs/EOF;</p> <p>(iii) in respect of performances of TCEs/EOF, the protection of moral and economic rights as required by the WIPO Performances and Phonograms Treaty, 1996; and</p>
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⁶⁸ See generally Part 4 of the Regional Model.

⁶⁹ See generally Part 4 of the Regional Model.

⁷⁰ GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5).

⁷¹ Such as the International Federation of Reprographic Rights Organizations (IFRRO).

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

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

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

any false, confusing or misleading indications or allegations in the course of trade and contrary to honest business practices, as to the origin, the nature, the manufacturing process, the characteristics, the suitability for their purpose, the quantity, endorsement by or linkage with the community of goods or services that refer to, draw upon or evoke TCEs/EoF can be prevented and/or is subject to civil or criminal sanctions; and

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

Discussion of options and mechanisms

78. The scope of protection concerns both the legal form that protection may take and the scope of protection itself, being the nature of the acts and omissions that would be prohibited, require authorisation or be regulated in other ways. Options and mechanisms relating to the legal form of protection was discussed above, and this section will address in particular options and mechanisms for the nature of the protection.

Economic rights of a copyright and related rights nature

79. The suggested principle above proposes amongst other things economic rights in respect of sacred TCEs and performances of TCEs/EoF. Following the example set by most copyright-inspired national laws for the protection of TCEs/EoF, rights over traditional literary and artistic materials could extend to acts such as reproduction, adaptation, public performance, distribution, public recitation, communication to the public, the making of derivative works and importation (of unauthorized copies and adaptations under the law of the importing country). Existing *sui generis* measures in copyright laws are, however, very diverse in their treatment of rights, and it would be difficult to codify their common elements.⁷² These rights could be assigned and licensed (although laws could restrict such assignment to ensure that rights remain with the traditional communities, such as the Pacific Regional Model⁷³, or to require the consent of a competent authority⁷⁴).

⁷² See and compare, for example, the laws of Algeria, Angola, Benin, Burkina Faso, Cameroon, Congo, Ghana, Côte d’Ivoire, Djibouti, Gabon, Guinea, Lesotho, Malawi, Mali, Morocco, Nigeria, Qatar, Central African Republic, Senegal, Sri Lanka, Togo, and Tunisia. See WIPO/GRTKF/IC/3/10, as well as Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), pp. 286 to 291, where existing copyright-based systems are extensively analyzed and compared. Also, Kuruk, P., “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,” 48 *American University Law Review* 769 (1999).

⁷³ Section 10.

⁷⁴ Mali, Morocco, Rwanda, Tunisia. See Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), *ibid*.

80. Key policy and legal questions pivot on the adaptation right, the right to make derivative works and on the setting of appropriate exceptions and limitations. The Model Provisions do not provide an adaptation right, and allow a wide exception in respect of ‘the borrowing of expressions of folklore for creating an original work of an author or authors.’⁷⁵ National *sui generis* laws for the protection of TCEs differ on this point: some grant an adaptation right and others do not. The Pacific Regional Framework has an adaptation right, and places upon external creators certain obligations towards the relevant community (such as to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying traditions used).

81. Most existing national laws for the protection of TCEs/EoF provide copyright-style economic rights because the protection for TCEs/EoF has been conceived within copyright. For example:

(a) in the Nigerian Copyright Act, ‘expressions of folklore are protected against reproduction, communication to the public by performance, broadcasting, distribution by cable or other means, and adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context (section 28(1));

(b) in Ghana, section 5 (1) of the Copyright Act, 1985 states that ‘works of Ghanaian folklore are hereby protected by copyright’;

(c) In the Pacific Regional Model, the following uses of TCEs/EoF require the prior and informed consent of the traditional owners:

- to reproduce the traditional knowledge or expressions of culture;
- to publish the traditional knowledge or expressions of culture;
- to perform or display the traditional knowledge or expressions of culture in public;
- to broadcast the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication;
- to translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture;
- to fixate the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording;
- to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expressions of culture;
- to create derivative works;
- to make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom;
- to use the traditional knowledge or expressions of culture in any other material form;
- if such use is a non-customary use (whether or not of a commercial nature)’;

⁷⁵ Section 4 (1) (iii), Model Provisions, 1982.

Prevention of insulting, derogatory and culturally and spiritually offensive uses

82. Prevention of insulting, derogatory and culturally and spiritually offensive uses of TCEs/EoF, particularly sacred TCEs can be achieved in various ways. Non-IP laws, such as cultural heritage laws and blasphemy laws might achieve the desired objective. Drawing on actual experiences with IP and IP-like legislation to date:

(a) the Tunis Model Law, 1976 provides in section 5(1) for moral rights, which are also applicable to TCEs/EoF, as being the rights of an ‘author’ to claim authorship, to object to and seek relief in connection with distortion, mutilation, modification or any other action which would be prejudicial to his honor or reputation;

(b) the Model Provisions, 1982 create an offense relating the prejudicial distortions of TCEs/EoF. They provide that willful (or negligent, as an additional option): failure to acknowledge the source; utilization of TCEs/folklore without authorization; deception in respect of the source of TCEs; presenting artifacts or the like as expressions of folklore of a certain community, from where, in fact, they have not been derived; and the distortion of TCEs/folklore in a way prejudicial to the cultural interests of the community concerned, are criminal offences;

(c) the Pacific Regional Model, 2002 establishes both economic and moral rights in TCEs/EoF (the moral rights are quoted elsewhere in this document);⁷⁶

(d) as noted, Australia is developing legislation to introduce communal moral rights into its copyright law;

(e) the WPPT, 1996 provides moral rights for performers of expressions of folklore. The relevant article 5 of the Convention reads as follows:

“(1)Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with [paragraph \(1\)](#) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.”

Failure to acknowledge source/ misleading indications as to source

83. The Model Provisions provide as follows:

⁷⁶ See Section 13.

“1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.

2. The provisions of paragraph 1 shall not apply to [certain free uses]”.

84. The Copyright Act of Nigeria, 1992 provides in section 28 (3) that “In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, and in conformity with fair practice, by mentioning the community or place from where the expression utilized has been derived”;

Prevention of false and misleading claims to ‘authenticity’, origin or link or endorsement by a community

85. The prevention of false and misleading claims to ‘authenticity’, origin or link or endorsement by a community can be achieved through a number of different legal mechanisms. A few examples follow:

(a) through registration of certification trade marks, the authenticity of genuine goods and services can be safeguarded. In Australia, certification marks have been registered by the National Indigenous Arts Advocacy Association (NIAAA)⁷⁷ and in New Zealand the Maori Arts Board, *Te Waka Toi*, is making use of trademark protection through the development of the *Toi Iho*™ Maori Made Mark⁷⁸. The Indian Arts and Crafts Act, 1990 of the USA allows the Indian Arts and Crafts Board to register trademarks of genuineness and quality;

(b) ‘truth in advertising’, trade practices and labeling laws (for example, the Indian Arts and Crafts Act, 1990⁷⁹, reported on elsewhere in this document);

(c) geographical indications (Portugal, Mexico and the Russian Federation have provided relevant examples of the registration of geographical indications with respect to TCEs and related TK⁸⁰); and

(d) unfair competition or trade practices law (for example, see above discussion on the company in Australia that was prevented from continuing to describe or refer to its range of hand painted or hand carved indigenous oriented souvenirs as ‘Aboriginal art’ or ‘authentic’ unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent.⁸¹

Prevention of acquisition of IP over TCEs/EoF

⁷⁷ See *Minding Culture* case studies by Terri Janke, “Indigenous Arts Certification Mark”, <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>

⁷⁸ For more information on the *Toi Iho*™ Mark see <<http://www.toiho.com>>

⁷⁹ WIPO/GRTKF/IC/3/10, par. 122 (i).

⁸⁰ See WIPO/GRTKF/IC/5/3.

⁸¹ See further WIPO/GRTKF/IC/5/3 and <<http://www.accc.gov.au/>> (April 7, 2003).

86. Once again, the acquisition of IP rights over TCEs/EoF, or certain TCEs/EoF, if deemed desirable, can be achieved in a variety of ways. For example, certain regional organizations and States have already taken steps to prevent as far as possible the unauthorized registration of indigenous marks as trademarks (these seek to achieve one of the forms of what was referred to as ‘defensive protection’). Three examples are the Andean Community, the United States of America and New Zealand:

(a) Article 136(g) of Decision 486 of the Commission of the Andean Community provides that “signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their culture or practice, except where the application is filed by the community itself or with its express consent.” In Colombia, a case has been presented in which the mark has been rejected as a result of the exception mentioned above. The case concerned an application for registration as a mark of the expression “Tairona”, which coincides with an indigenous culture that inhabited Colombian territory. It was decided that the expression “Tairona” was protected as part of the culture’s heritage and of the country as such. In that regard, only representatives of this culture or persons with the authorization of those representatives would be entitled to request consent to use the expression as a distinctive sign and, in this particular case, as a mark;

(b) The United States Patent and Trademark Office (the USPTO) has established a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes.⁸² Under Section 2(a) of the Trademark Act, 1946, as amended, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. Such provision provides not only protection for folklore aspects of Native American tribes, but also “those of other indigenous peoples worldwide.” The Trademark Law Treaty Implementation Act, 1998 required the USPTO to complete a study on the protection of the official insignia of federally and state-recognized Native American tribes. As a direct result of this study,⁸³ on August 31, 2001 the USPTO established a Database of Official Insignia of Native American Tribes. The Database of Official Insignia of Native American Tribes may be searched and thus prevent the registration of a mark confusingly similar to an official insignia. “Insignia” refers to “the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe” and does not include words;⁸⁴

(c) In New Zealand, the Trade Marks Act now contains a provision which allows the Commissioner of Trade Marks to refuse to register a trademark if it is considered by the Commissioner that, on reasonable grounds, the use or registration is likely to offend a significant section of the community, including the Indigenous people of that country, Maori. Under the section which lists grounds for not registering trademarks the Act states:

“(1) The Commissioner must not do any of the following things:

⁸² See “Report on the Official Insignia of Native American Tribes,” September 30, 1999.

⁸³ Available at <<http://www.uspto.gov/web/menu/current.html>> (30Nov99 entry).

⁸⁴ *Ibid.*, pp. 24-26.

- (b) register a trademark or part of a trade mark if –
- (i) the Commissioner considers that its use or registration would be likely to offend a significant section of the community, including Maori”.⁸⁵

87. The prevention of the grant of patent rights over TCEs/EoF and non-inventive derivatives thereof may be achieved, for example, through the documentation and publication of information concerning the TCEs/EoF such as would destroy novelty and thus prevent anyone from acquiring a patent. In WIPO/GRTKF/IC/6/3 Add. it was reported that work is underway on the possible development of industrial property classification tools for the purposes of the defensive protection of TCEs/EoF, concerning the possible use of patent classification tools to facilitate the searching of patent documents covering TCEs that are relevant to claimed inventions. Use of such classification tools could assist in including patent documents relevant to TCEs within searchable ‘prior art’, thereby reducing the likelihood of patents being granted over or in respect of TCEs that have already been disclosed. More specifically, a Task Force on Classification of Traditional Knowledge, established by a Committee of Experts of the Special Union for the International Patent Classification (IPC)⁸⁶, has, as requested by the Committee of Experts, prepared a report which contains a survey on ‘possible classification aspects relating to ... traditional cultural expressions’. This report was discussed at a meeting of the Committee of Experts which took place from February 23 27, 2004.⁸⁷ The Committee of Experts of the IPC is responsible for the revision of the IPC. A new edition of the IPC is expected to come into force on January 1, 2006 (it was initially expected to come into force a year earlier but for technical reasons the coming into force has been postponed).⁸⁸ The revised IPC will contain an extended classification scheme for traditional medicinal knowledge, as has been discussed for some time in the Committee of Experts and the Intergovernmental Committee. See further document WIPO/GRTKF/IC/6/8 which reports on the substantial progress made in this respect, as well as on other related and complementary activities aimed at the defensive protection of TK. It is recalled, however, that ‘TK’ for purposes of the work of the Intergovernmental Committee, the IPC’s Committee of Experts and other WIPO bodies refers only to technical and scientific knowledge formations, such as medicinal knowledge, to which the patent system in particular is of direct and most extensive relevance. In so far as TCEs are concerned, the survey, which appears as an appendix to the report of the Task Force,⁸⁹ provides a general overview of how the current IPC relates to and covers components of TCEs. As the report shows, several existing sub-classes of the IPC could cover certain

⁸⁵ The Act is available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/049.html>

⁸⁶ The International Patent Classification (IPC) is based on an international multilateral treaty administered by WIPO. This treaty is called the Strasbourg Agreement Concerning the International Patent Classification, which was concluded in 1971 and entered into force in 1975. On March 1, 2004, 54 States were party to the Strasbourg Agreement. However, the industrial property offices of more than 100 States, four regional offices and the International Bureau of WIPO under the Patent Cooperation Treaty (PCT) actually use the IPC. The classification is indispensable for the retrieval of patent documents in the search for ‘prior art’, in order to verify the novelty and evaluate the inventive step of patent applications. Such retrieval is needed by patent-issuing authorities, potential inventors, research and development units, and others concerned with the application or development of technology. See http://www.wipo.int/classifications/en/ipc/ipc_ce/34/index.htm

⁸⁷ See http://www.wipo.int/classifications/en/ipc/ipc_ce/34/index.htm

⁸⁸ See draft report of Committee of Experts Meeting IPC/CE/34/10 Prov., paras. 36 to 47.

⁸⁹ Available as WIPO document IPC/CE/34/8.

tangible TCEs, such as jewellery, furniture, weaving, decorative arts, lace-making and musical instruments. The Task Force concluded in its report that it could use this overview “as a basis when considering its work on further development of classification tools for traditional knowledge and other relevant areas”. At its meeting that took place from February 23 to 27, 2004, the Committee of Experts agreed with these conclusions of the Task Force and instructed it to “continue its work on further development of classification tools for traditional knowledge and other relevant areas ...”⁹⁰, “other relevant areas” being TCEs for example. Earlier documents on TCEs prepared for the Intergovernmental Committee had alluded to the use and development of industrial property classification tools as a possible contribution to the defensive protection of TCEs (see for example WIPO/GRTKF/IC/4/3 paras. 164 to 167 and WIPO/GRTKF/IC/5/3, paras. 269 to 272). These passages referred mainly to the possible updating and expansion of the existing international classification system for industrial designs⁹¹ in view of the particular relevance of industrial design protection for TCEs.

Prevention of exploitation of sacred and secret materials

88. Protection of sacred or secret materials can draw upon principles dealing with unfair competition, undisclosed and confidential information, breach of trust and confidence and other such areas. For example, Article 39 of the TRIPS Agreement provides that in the course of protecting against unfair competition under Article 10*bis* of the Paris Convention, members of the World Trade Organization (WTO) must protect “undisclosed information”, as defined in the Article, against unlawful acquisition, disclosure or use in a manner contrary to honest commercial practices.

89. As an example, in the Australian case of *Foster v Mountford*⁹² the common law doctrine of confidential information was used to prevent the publication of a book containing culturally sensitive information. The case concerned an anthropologist, Dr. Mountford, who undertook an expedition to the Northern Territory outback in 1940. Local Aboriginal people revealed to him tribal sites and objects possessing deep religious and cultural significance for them. The defendant recorded this information some of which he published in a book in 1976. The plaintiffs successfully sought an interlocutory injunction restraining the publication of the book on the basis of breach of confidence. (The plaintiffs could not bring an action for copyright infringement because the work in question, the book, had not been written by them and they had not acquired the copyright in it). The Court held that the publication of the book could disclose information of deep religious and cultural significance to the Aborigines that had been supplied to the defendant in confidence and the revelation of such information amounted to a breach of confidence.

Communal control over derivative works

90. Previous discussions have focussed on the possibility of communal regulation of the exploitation of derivative works created by individuals, particularly those not connected with the traditions and cultural materials they adapted or were inspired by:

⁹⁰ Ibid., para. 55.

⁹¹ The Locarno Agreement Establishing an International Classification for Industrial Designs, 1979.

⁹² (1976) 29 FLR 233.

(a) the Tunis Model Law, the Bangui Agreement, and other *sui generis* systems and national laws do generally not regulate the exploitation of derivative works;

(b) the Model Provisions, 1982 contain no right of adaptation and have a wide ‘borrowing exception’;

(c) by contrast, the Pacific Regional Framework places upon the creators of derivative works certain obligations towards the relevant community (such as, in this case, to acknowledge the community, to share benefits from commercial exploitation of the IP in the derivative works, and to respect some form of moral rights in the underlying traditions and heritage used).

B.6 Exceptions and limitations

91. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

‘Exceptions and limitations

Measures for the protection of TCEs/EoF should:

(i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;

(ii) extend only to utilizations of TCEs/EoF outside the traditional or customary context, whether or not for commercial gain;

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

92. Examples of exceptions typically found in laws for the protection of TCEs/EoF deal inter alia with three questions relevant to determining which utilizations of TCEs/EoF should be subject to some form of authorization:

(a) whether there is gainful intent;

(b) whether the utilization is made by members or non-members of the relevant community from which the expression comes; and

(c) whether the utilization occurs outside the traditional or customary context.

93. For example:

(a) the Model Provisions, 1982 apply only to uses of TCEs/EoF that take place within the customary or traditional context and with gainful intent. They also contain typical copyright exceptions;

(b) the Pacific Regional Model does not apply to customary uses by ‘traditional owners’ (sections 5 and 7(3)). The Panama Law, 2000 and the Peru Law, 2002 also contain similar provisions. The Pacific Regional Model also contains typical copyright exceptions.

94. Other examples of exceptions typically found in laws for the protection of TCEs/EoF are:

- (a) the ‘borrowing’ of an expression of folklore in order to create an original work of authorship (Model Provisions, 1982, and Lesotho, Malawi and Nigeria⁹³);
- (b) uses by folkloric dance groups and small non-indigenous artisans (the Panama Law);
- (c) uses by public entities for non-commercial purposes (the Tunis Model Law, and Angola, Congo, Djibouti, Kenya and Togo⁹⁴);
- (d) uses by citizens of the country (as opposed to non-citizens; Indonesian Copyright Law, 2002).

B.7 Term of protection

95. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

<p>‘Term of protection</p> <ul style="list-style-type: none">(a) Protection of any TCE/EoF should endure for as long as the TCE/EoF continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the relevant indigenous people or traditional or cultural community.(b) Measures for the protection of TCEs/EoF could specify circumstances in which an expression will be deemed no longer to be characteristic of a relevant people or community.’

Discussion of options and legal mechanisms

96. Regarding term of protection and the implementation of such a principle, there could be the following options and possible mechanisms:

- (a) while the Berne Convention and the TRIPS Agreement stipulate 50 years as a minimum period for protection, countries are free to protect copyright for longer periods (and many do so). Rights to the famous work ‘Peter Pan’ vest in perpetuity under United Kingdom copyright law for the benefit of a charitable cause, and a proposal has been made in Australia to grant perpetual protection to the art works of a renowned indigenous artist for the benefit of his descendant;
- (b) in so far as *sui generis* legislation goes, no time limit is set in the Model Provisions, the Panama Law and the Pacific Regional Framework;
- (c) the Panama Law seems to link the term of protection to the protected subject matter continuing to display the characteristics that qualify it for protection in the first place (as protection is indefinite rather than unlimited; see section 7). This is the essence of the principle suggested in WIPO/GRTKF/IC/ 7/3. This entails a trademark-like emphasis on current use, so that once the community that the TCE identifies no longer uses the TCE or no longer exists as a defined entity (analogous too to abandonment of a trademark), protection for the TCE would lapse.⁹⁵ Such an approach has the merit of giving effect to customary laws and practices and drawing upon the very essence of the subject matter of protection (it being recalled that at the heart of TCEs/EoF is that they are characteristic of and identify a community (see above)). When a TCE ceases to do so, it ceases by definition to be a TCE and it follows that protection should lapse. There is

⁹³ See Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), *Indigenous Heritage and Intellectual Property*, 2004 (Kluwer), p. 289.

⁹⁴ See Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), *Indigenous Heritage and Intellectual Property*, 2004 (Kluwer), p. 289.

⁹⁵ Scafidi, S., ‘Intellectual Property and Cultural Products,’ 81 *B.U.L. Rev.* 793.

something of this line of thinking also in the USA's Arts and Crafts Act, 1990 which excludes from protection products which are no longer 'Indian', because, for example, they have become 'industrial products'. The Act sets out in some detail what constitutes an 'Indian product'.

B.8 Formalities

97. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

'Formalities

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

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

Discussion of options and legal mechanisms

98. One option would be to require automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similarly to copyright (the Model Provisions, 1982 and the Pacific Regional Framework, 2002).

99. A second option is to require some form of notification, which could have merely declaratory effect, in which case proof of registration would be used to substantiate a claim of protection. Some form of registration may provide useful precision, transparency and certainty on which TCEs are protected and for whose benefit. The many copyright laws which require the notification of copyright works also provide models for ways in which to implement such a principle:

(a) for example, the Copyright Act of Mexico provides a copyright registration system. According to section 162 of the Act, "The purpose of the Public Copyright Register is to ensure the legal security of authors, owners of neighboring rights, the holders of the economic rights concerned and their successors in title, and also to afford sufficient publicity to works, instruments and documents through registration. Literary and artistic works and neighboring rights shall be protected even if they are not registered;

(b) the Indonesian Copyright Act, 2002 allows for non-compulsory registration of copyright works, and the Copyright Office reports receiving many applications for registration of new batik motifs each month, mainly from Indonesian small and medium sized enterprises (SMEs).

100. Another example is database for purposes of containing the official insignia of all State and federally recognized Native American tribes established by the United States Patent and Trademark Office (the USPTO).⁹⁶ Under Section 2(a) of the Trademark Act, 1946, as amended, a proposed trademark may be refused registration or cancelled (at any time) if the

⁹⁶ See "Report on the Official Insignia of Native American Tribes," September 30, 1999.

mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. Such provision provides not only protection for folklore aspects of Native American tribes, but also “those of other indigenous peoples worldwide.” The Trademark Law Treaty Implementation Act, 1998 required the USPTO to complete a study on the protection of the official insignia of federally and state-recognized Native American tribes. As a direct result of this study,⁹⁷ on August 31, 2001 the USPTO established a Database of Official Insignia of Native American Tribes. The Database of Official Insignia of Native American Tribes may be searched and thus prevent the registration of a mark confusingly similar to an official insignia. “Insignia” refers to “the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe” and does not include words;⁹⁸

B.9 Sanctions, remedies and enforcement

101. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

‘Sanctions, remedies and enforcement

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

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

Discussion of options and legal mechanisms

102. This issue, which concerns which civil and criminal sanctions and remedies may be made available for breaches of the rights provided, is not elaborated on in detail at this stage. Existing IP and *sui generis* legislation, case law and other sources provide a basis for developing appropriate principles, options and mechanisms at a later stage, perhaps once core principles for protection have been further discussed. The Pacific Regional Model, for example, sets out detailed provisions on enforcement of rights.⁹⁹ See also the copyright law of Nigeria, 1992. Reference has been made above to the possible role of an ‘authority’ in assisting communities to enforce their rights.

103. It is noted, however, that communities and others argue that the remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous artist-copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. Damages awarded by courts could take such cultural issues in to account, as in the case *George M*, Payunka, Marika and Others v Indofurn Pty. Ltd.*¹⁰⁰ References have also been made to the desirability

⁹⁷ Available at <<http://www.uspto.gov/web/menu/current.html>> (30Nov99 entry).

⁹⁸ *Ibid.*, pp. 24-26.

⁹⁹ Sections 26 to 34.

¹⁰⁰ 30 IPR 209. See Janke, ‘Minding Culture’.

of alternative dispute resolution (ADR) in this area,¹⁰¹ and the Pacific Regional Model makes specific reference to ADR.¹⁰²

B.10 Application in time

104. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

‘Application in time

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

Discussion of options and mechanisms

105. This issue concerns whether protection should have some retroactive effect, and in particular how to deal with utilizations of TCEs/EoF that are continuing when the law or instrument enters into force and had lawfully commenced before entry into force. Such a principle as suggested in WIPO/GRTKF/IC/ 7/3 in its various forms may be implemented in a range of ways. For example:

(a) the Panama Law, 2000 states that rights previously obtained shall be respected and not affected by the Law;

(b) the Pacific Regional Model, 2002 provides in article 3 as follows:

“This Act applies to traditional knowledge and expressions of culture that: were in existence before the commencement of this Act; or are created on or after that commencement. This Act does not affect or apply to rights that exist immediately before the commencement of this Act, including intellectual property rights. This Act does not affect or apply to contracts, licences or other agreements entered into by traditional owners before the commencement of this Act in relation to the use of traditional knowledge or expressions of culture.”

(c) the Indian Arts and Crafts Act, 1990 only operates prospectively (as from 1935, when the predecessor Act came into force).

¹⁰¹ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p.9), Asian Group (WIPO/GRTKF/IC/2/10, African Group (WIPO/GRTKF/IC/3/15).

¹⁰² Section 33.

B.11 Relationship with intellectual property protection

106. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

‘Relationship with intellectual property protection

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

Discussion of options and legal mechanisms

107. Existing laws provide for numerous examples of how such a principle could be implemented:

(a) many laws distinguish between TCEs/EoF and works derived therefrom. The former receive *sui generis* protection, the latter conventional copyright or other IP protection. Previous documents¹⁰³ highlighted the distinction made by copyright and other IP laws between contemporary expressions, adaptations and interpretations of traditional cultures and folklore (which are often protected by copyright, industrial designs and other IP laws) and other expressions of traditional cultures or folklore which are not so protected (which have been referred to as ‘pre-existing’ or ‘underlying,’ or ‘expressions of traditional cultures/folklore *stricto sensu*’). For example, the Tunis Model Law on Copyright protects ‘works derived from national folklore’ as original copyright works, whereas folklore itself, described as ‘works of national folklore,’ is accorded a special (*sui generis*) type of copyright protection because they are unprotected by copyright. The Model Provisions and the Bangui Agreement of OAPI both make a similar distinction. This distinction is also reflected in national laws, for example those of Tunisia (which refers to both ‘folklore’ and ‘works inspired by folklore’)¹⁰⁴, Hungary, Indonesia and many others;

(b) article 12 of the Model Provisions, 1982 provides that “This [law] shall in no way limit or prejudice any protection applicable to expressions of folklore under the copyright law, the law protecting performers, producers of phonograms and broadcasting organizations, the laws protecting industrial property, or any other law or international treaty to which the country is party; nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore”;

(c) articles 11 and 12 of the Pacific Regional Model are relevant:

“11 Additional rights

The traditional cultural rights in traditional knowledge or expressions of culture are in addition to, and do not affect, any rights that may subsist under any law relating to copyright, trademarks, patents, designs or other intellectual property.

¹⁰³ See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

¹⁰⁴ Law 94-36 of February 24, 1994 on Literary and Artistic Property.

12 Derivative works

- (1) Any copyright, trademark, patent, design or other intellectual property right that exists in relation to a derivative work vests in the creator of the work or as otherwise provided by the relevant intellectual property law.
- (2) If a derivative work, traditional knowledge or expressions of culture are to be used for a commercial purpose, the authorised user agreement must:
 - (a) contain a benefit sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners; and
 - (b) provide for identification of the traditional knowledge or expressions of culture on which the derivative work is based in an appropriate manner in connection with the exploitation of the derivative work by mentioning the traditional owners and/or the geographical place from which it originated; and
 - (c) provide that the traditional knowledge or expressions of culture in the derived work will not be subject to derogatory treatment.”

B.12 International and regional protection

108. WIPO/GRTKF/IC/ 7/3 suggested the following principle:

‘International and regional protection

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

(b) Existing or new regional organizations should be tasked with resolving competing claims to TCEs/EoF by communities within distinct countries, using customary laws, local information resources, alternative dispute resolution (ADR) and other such practical arrangements as necessary.’

Discussion of options and legal mechanisms

109. The Model Provisions, 1982 provide as follows:

“Protection of Expression of Folklore of Foreign Countries

Expressions of folklore developed and maintained in a foreign country are protected under this [law]

- (i) subject to reciprocity, or
- (ii) on the basis of international treaties or other agreements.”

110. The Pacific Regional Model states that:

“In accordance with reciprocal arrangements, this Act may provide the same protection to traditional knowledge and expressions of culture originating in other countries or territories as is provided to traditional knowledge and expressions of culture originating in the [Enacting country]”.

‘Regional folklore’

111. Options and legal and practical mechanisms for addressing communities in different countries and even regions who may lay claim to the same or similar folklore (‘regional folklore’), include *inter alia* the use in such cases of national and/or international folklore registers and databases, alternative dispute resolution (ADR), systems of registration and notification, collective management and the establishment of dispute-resolution organizations, or maybe combinations of these.¹⁰⁵ Certain commentators, such as Kuruk, have suggested that regional systems, institutions and dispute resolution be established and used to deal with these questions,¹⁰⁶ and a Sub-Regional seminar on TCEs/EoF held in Rabat, Morocco in May 2003 recommended *inter alia* that Arab countries who share popular and traditional cultural patrimony should create joint commissions to study and put in place equitable strategies for protection of TCEs/EoF. Existing regional organizations and mechanisms (such as ARIPO and OAPI in Africa, who, together with Zambia, have raised this issue in the Committee¹⁰⁷) may be important stakeholders in resolving the ‘regional folklore’ question.

[Annex II follows]

¹⁰⁵ See for example the responses to the WIPO Questionnaire of 2001 of Canada, Colombia, Egypt, Gambia, Indonesia, Jamaica, Kyrgystan, Malaysia, Mexico, Romania and the Russian Federation. See WIPO/GRTKF/IC/3/10.

¹⁰⁶ Kuruk, P., “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,” 48 American University Law Review 769 (1999).

¹⁰⁷ WIPO/GRTKF/IC/5/15, paras. 48, 50 and 51.

ANNEX II

Comparative Summary of *Sui Generis* Legislation

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)	Panama Law No. 20 (June 26, 2000) and Executive Decree No. 12 (March 20, 2001)	South Pacific Model Law for National Laws (2002)
POLICY CONTEXT AND OBJECTIVES	In so far as “folklore” is concerned, protection is provided “to prevent any improper exploitation and to permit adequate protection of the cultural heritage known as folklore which constitutes not only a potential for economic expansion, but also a cultural legacy intimately bound up with the individual character of the community.” (Notes to Section 6)	Folklore is an important part of living cultural heritage of nations. Dissemination of folklore can lead to improper exploitation of cultural heritage, and any abuse or any distortion of folklore prejudices the cultural and economic interests nations. Expressions of folklore manifesting intellectual creativity deserve intellectual property-type protection. Such protection of expressions of folklore is indispensable for their development, maintenance and dissemination. Therefore: Protection is provided for expressions of folklore against illicit exploitation and other prejudicial actions. Preamble and Section 1.	Promote the effective contribution of intellectual property to the development of Member States. Protect intellectual property in an effective and uniform manner. Contribute to the promotion of the protection of literary and artistic property as an expression of cultural and social values.	The objective is to protect the collective intellectual property rights and traditional knowledge of indigenous communities through the registration, promotion, commercialization and marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural identities and for social justice (Preamble and Article 1 of the Law; Preamble of the Decree). Another key objective is the protection of the authenticity of crafts and other traditional artistic expressions.	The objective is to protect rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialization thereof, subject to prior and informed consent and benefit-sharing. The Model Law also reflects the policy that it should complement and not undermine IP laws.

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)	Panama Law No. 20 (June 26, 2000) and Executive Decree No. 12 (March 20, 2001)	South Pacific Model Law for National Laws (2002)
<p>SUBJECT MATTER</p> <p>(The protected subject matter)</p>	<p>“Folklore” is defined in Section 18 - all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.</p> <p>Folklore receives <i>sui generis</i> protection.</p> <p>On the other hand, works derived from folklore are treated as copyright works.</p>	<p>Productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community, in particular, verbal expressions, (folk tales, folk poetry, riddles); musical expressions (folk songs and instrumental music); expressions by action (folk dances, plays and artistic forms or rituals); and tangible expressions (productions of folk art, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket-weaving, needlework, textiles, carpets, costumes, musical instruments, and [architectural forms.] (Section 2).</p>	<p>“Expressions of folklore” are defined as productions of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community, including folk tales, folk poetry, folk songs, instrumental music, folk dancing and entertainment as also the artistic expressions of rites and productions of folk art (Article 2 (xx)).</p> <p>Expressions of folklore and works derived from folklore seem to be protected as copyright works (Article 5(xii)).</p> <p>Translations, adaptations, arrangements and other transformations of expressions of folklore also seem to be protected as copyright works, as are collections and databases of works and expressions of folklore (Article 6 (1) (i) & (ii)).</p>	<p>Customs, traditions, beliefs, spirituality, cosmovision, folkloric expressions, artistic manifestations, traditional knowledge and any other type of traditional expressions of indigenous communities which are part of their cultural assets (cultural heritage) (Law, Article 2).</p> <p>“Collective intellectual property rights” and “traditional knowledge” embodied in creations such as inventions, models, designs and drawings, innovations contained in images, figures, graphic symbols, petroglyphs and other material, cultural elements of history, music, arts and traditional artistic expressions (Decree, Article 1).</p> <p>Collective indigenous rights” means the indigenous cultural and intellectual property rights relating to art, music, literature, biological, medical and ecological knowledge and other</p>	<p>Cultural expressions are the main focus of the Law.</p> <p>Expressions of culture are defined as any ways in which traditional knowledge appears or is manifested, including inter alia names, stories, chants, riddles, histories, songs in oral narratives, art and craft, musical instruments, sculpture, painting, carving, pottery, terracotta mosaic, woodwork, metalware, painting, jewelry, weaving, needlework, shell work, rugs, costumes and textiles, music, dances, theatre, literature, ceremonies, ritual performances, cultural practices, designs, architectural forms.</p>

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)	Panama Law No. 20 (June 26, 2000) and Executive Decree No. 12 (March 20, 2001)	South Pacific Model Law for National Laws (2002)
			<p>“Performances” as defined include performances of “expressions of folklore” (Article 46).</p>	<p>subject matter and manifestations that have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people (Article 2, Decree). “Traditional knowledge” means the collective knowledge of indigenous people based on the traditions of centuries, and indeed millennia, which are tangible and intangible expressions encompassing their science, technology and cultural manifestations, including their genetic resources, medicines and seeds, their knowledge of the properties of fauna and flora, oral traditions, designs and visual and representative arts. (Article 2 Decree).</p> <p>Only subject matter capable of commercial use appears covered (Law, Article 1).</p>	

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)	Panama Law No. 20 (June 26, 2000) and Executive Decree No. 12 (March 20, 2001)	South Pacific Model Law for National Laws (2002)
				A classification system is created by the Decree (Article 3) and several examples of protected subject matter are given by the Law and the Decree, such as traditional dresses of certain named indigenous communities, musical instruments, music, dances, performances, oral and written expressions, working instruments and traditional art and techniques for making them, such as basket and bead work (Law, Articles 3, 4 and 5).	
<p>CRITERIA FOR PROTECTION</p> <p>(Conditions that the subject matter must meet for protection. Examples: originality, novelty, distinctiveness, fixed form etc).</p>	<p>Fixation not required (Section 5bis); originality not required.</p> <p>No criteria specifically stated.</p>	None specified.	<p>Expressions of folklore and works inspired by them are regarded as “original” copyright works (Article 5).</p> <p>Need not be fixed on material medium (Article 4(2)).</p>	<p>The subject matter must:</p> <ul style="list-style-type: none"> (i) be capable of commercial use (Law, Article 1); (ii) be based upon tradition, although it need not be ‘old’ (Law, Article 15); (iii) fit within the classification system established by Article 3 of the Decree; 	<p>The subject matter must be “traditional” i.e., (i) created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes;</p>

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				(iv) be “collective”, i.e., the subject matter must have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people (Decree, Article 2), or must be regarded as belonging to one or more of the indigenous communities of Panama (Decree, Article 5 and 6).	(ii) transmitted from generation to generation; (iii) regarded as pertaining to a particular traditional group, clan, or community of people; and (iv) is collectively originated and held (Section 4). Need not be in material form (Section 8).
HOLDER OF RIGHTS	Rights in folklore exercised by a competent authority (Sections 6 and 18).	Either a “competent authority” or relevant community.	The author is the first holder of the economic and moral rights. Specific provisions deal with collaborative works, collective works, the works of employees, and other cases – there are no specific provisions dealing with expressions of folklore (Articles 28 to 33).	The relevant indigenous communities represented by their general congresses or traditional authorities. More than one community can be registered collectively as holders of the rights (Decree, Article 5).	Traditional owners of TK or expressions of culture, being the group, clan or community, or individual recognized as part of group, clan or community, in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with customary law and practices (Section 4).

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					If a derivative work is created, IP in work vests in creator or as provided for by IP law (see further below).
RIGHTS CONFERRED (Including exemptions and free uses)	<p>Section 6 – works of national folklore enjoy rights referred in Section 4 and 5(1) and are exercised by the competent authority.</p> <p>Section 4 – Economic Rights: author has exclusive right to reproduce, make translation, adaptation, arrangement, transformation, communicate work to public either through performance or broadcasting.</p>	<p>The following uses when made with both gainful intent and outside the traditional or customary context, require prior authorization: publication, reproduction, distribution of copies, public recitation, performance, transmission by wire or wireless means and any other form of communication to the public (Section 3).</p> <p>Acknowledgement of source (Section 5) - source must be acknowledged in appropriate manner (mentioning community and/or geographic place from where expression utilized has derived from) in all printed publications, in any communications to the public.</p>	<p>Expressions of folklore and works inspired by them are regarded as copyright works in respect of which economic and moral rights as understood in the copyright sense seem to apply (Article 8 and 9).</p> <p>Performances of expressions of folklore are accorded the same protection as is accorded to other performances (Article 48).</p> <p>In addition, however, expressions of folklore and works that have fallen into the public domain are subject to “<i>domaine public payant</i>” (Section 59).</p>	<p>Collective rights to authorize or prevent:</p> <ul style="list-style-type: none"> (i) use and commercialization; (Article 15). (ii) industrial reproduction (Law, Article 20). <p>Collective right to apply for IP over protected subject matter (Law, Article 2).</p> <p>Collective right to prevent or authorize third parties from acquiring exclusive IP over protected subject matter (Law, Article 2).</p>	<p>The Model Law establishes “traditional cultural rights” and “moral rights” in TK or expressions of culture.</p> <p>Traditional cultural rights are rights to authorize or prevent the following uses:</p> <ul style="list-style-type: none"> (i) to reproduce the traditional knowledge or expressions of culture; (ii) to publish the traditional knowledge or expressions of culture; (iii) to perform or display the traditional knowledge or expressions of culture in public;

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	<p>Section 5(1) - Moral Rights: to claim authorship, to object to and seek relief in connection with distortion, mutilation, modification or any other action which would be prejudicial to his honor or reputation.</p> <p>Rights do not apply however when works of national folklore are used by a public entity for non-commercial purposes (Section 61bis).</p> <p><i>Domain public payant</i> system also introduced (Section 17). Users of works of national folklore must pay percentage of receipts to competent authority for specified purposes (Section 17).</p>	<p>Exceptions (Section 4 and 5(2)): No authorization required for:</p> <ul style="list-style-type: none"> (i) purposes of education (ii) utilization “by way of illustration” in original work (iii) where expressions of folklore are “borrowed” for creating an original work of author (iv) “incidental utilization” such as reporting on current events, located permanently in public place. 	<p>The exploitation of expressions of folklore and that of works or productions that have fallen into the public domain on expiry of the terms of protection shall be subject to the user entering into an undertaking to pay to the national collective rights administration body a relevant royalty. Royalties collected with respect to the exploitation of expressions of folklore shall be devoted to welfare and cultural purposes.</p>	<p>Collective right to consent to the certification of cultural expressions as works of indigenous traditional art or handicraft and handmade by natives (Law, Article 10, Decree, Article 15).</p> <p>Exemptions for folkloric dance groups (Law, Article 16) and small non-indigenous artisans in certain cases –they are able to manufacture and market reproductions, but they will not be able to claim the collective rights recognized by this Law (Law, Articles 23 and 24; Decree, Articles 26 and 27)</p> <p>Registration of collective rights in an object or in traditional knowledge shall not affect the traditional exchange of the object or the knowledge in question between indigenous peoples (Decree, Article 11).</p>	<ul style="list-style-type: none"> (iv) to broadcast the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication; (v) to translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture; (vi) to fixate the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording;

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					<p>(vii) to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expressions of culture;</p> <p>(viii) to create derivative works;</p> <p>(ix) to make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom;</p> <p>(x) to use the traditional knowledge or expressions of culture in any other material form, if such uses are a non-customary (whether or not of a commercial nature). (Section 7).</p>

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					<p>“Moral rights” refers to rights of attribution of ownership; the right not to have ownership falsely attributed; right not to have TK subject to derogatory treatment (Section 13).</p> <p>If cultural expressions and derivative works are used for commercial purposes, user must share benefits with traditional owners, acknowledge source and respect moral rights (Section 12).</p> <p>Traditional cultural rights do not prevent uses of cultural expressions by traditional owners (Section 7(3), nor to face-to-face teaching, criticism or review, reporting news or current events, judicial proceedings, and incidental use, although sufficient acknowledgement is needed in these cases (Section 7(4) and (5)).</p>

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PROCEDURES AND FORMALITIES	<p>None stated.</p> <p>License agreements authorized by the competent authority but must be preceded by negotiations with parties concerned.</p>	<p>Uses as contemplated in Section 3 subject to authorization (section 9).</p> <p>Competent authority grants authorization, fee required (section 10(2)).</p> <p>Appeals against decisions made by person applying for authorization and/or representative of interested community section (section 10(3)).</p>	No particular procedures for expression of folklore.	<p>A special registration system is established (Law, Article 1).</p> <p>Applications for registration must specify that a collective right is involved, that the object applied for belongs to an indigenous community, the technique used, and the history and brief description of the object (Decree, Article 6).</p> <p>Registration must be made by the indigenous community or by its general congresses or indigenous traditional authority (Law, Article 7).</p> <p>The application must contain certain prescribed information (Decree, Article 7) and the form is publicly available. The application must include a specimen of the object.</p>	<p>Uses of cultural expressions require prior and informed consent.</p> <p>Applications for consent may be made directly to a “Cultural Authority” or directly to traditional owners.</p> <p>Applications to the Cultural Authority must be in prescribed form; specify manner in which applicant proposes use; state purpose for which use intended; prescribed fee.</p> <p>The Cultural Authority must finalize application in prescribed period. If not, it is deemed that consent not given by traditional owners.</p> <p>Applications are published by means of copy to traditional owners, copy in national newspaper, and if</p>

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				<p>The application procedure does not require legal services and is exempt from payment (Law, Article 7).</p> <p>Registrations are published and appeals against them may be lodged (Decree, Article 10).</p> <p>The register of collective rights is public, with the exception of experiments and cognitive processes conducted by indigenous peoples and the traditional production techniques or methods used (Decree, Article 12).</p> <p>The position of an examiner on indigenous collective rights is established in the industrial property office to examine all applications filed to ensure that industrial property registrations are not granted that are against the Law (Law, Article 9).</p>	<p>required broadcast on radio and TV.</p> <p>Appeals relating to application must be made within 28 days of publication.</p> <p>In the event of direct negotiations between the user and the owners, the Cultural Authority must still be provided with a copy of the proposed authorized user agreement (Section 25(2)).</p> <p>Potential users of cultural expressions must enter into an authorized user agreement with the traditional owners should they agree to the proposed use. An authorized user agreement should include terms and conditions about the following:</p>

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					<ul style="list-style-type: none"> (i) sharing of financial and other benefits arising from the use of the traditional knowledge or expressions of culture; (ii) compensation, fees, royalties or other payments for the use; (iii) whether the use will be exclusive or non-exclusive; (iv) duration of the use to be allowed and rights of renewal; (v) disclosure requirements in relation to the use; (vi) the possible sharing by the traditional owners of any intellectual property rights arising from the use of the traditional knowledge or expressions of culture; (vii) access arrangements for the traditional owners;

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					<p>(viii) education and training requirements for the applicant;</p> <p>(ix) controls on publication;</p> <p>(x) specify whether the rights arising under the agreement can be assigned;</p> <p>(xi) choice of law in relation to disputes under the agreement;</p> <p>(xii) respect for moral rights of the traditional owners.</p> <p>If a prospective user and the traditional owners enter into an authorized user agreement, the traditional owners are deemed to have given their prior and informed consent to the proposed use.</p> <p>The Cultural Authority is to keep a register of authorized user agreements.</p>

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RESPONSIBILITIES OF NEW OR EXISTING AUTHORITIES AND INSTITUTIONS	<p>Competent authority – proposed that authority be body responsible for administration of authors’ rights within country (Notes).</p> <p>User of work of folklore must obtain authorization from competent authority</p> <p>Competent authority defined in Section 18.</p> <p>Sums collected by the competent authority must be used <i>inter alia</i> to protect and disseminate national folklore (Section 17).</p>	<p>Competent authority determined by enacting country (Section 9(1))</p> <p>Court has jurisdiction to hear appeals against decisions of competent authority (Section 11(1)).</p> <p style="text-align: center;">OR</p> <p>Court has jurisdiction in case of offences under Section 6 to Section 11(2).</p>	No particular provisions concerning expressions of folklore.	<p>Applications for registration are made to the industrial property office or the copyright office (Law, Article 4).</p> <p>A Department of Collective Rights and Expressions of Folklore is established within the industrial property office to approve applications and maintain the register (Law, Article 7).</p> <p>Officials of the industrial property office and the Department of Collective Rights and Expressions of Folklore may go to indigenous communities to gather information necessary for prosecution of applications they may wish to file.</p>	<p>The cultural authority must:</p> <ul style="list-style-type: none"> (i) receive and process applications; (ii) identify traditional owners; (iii) monitor compliance and inform of breaches; (iv) develop standard terms and conditions for authorized user agreements; (v) keep a register of authorized user agreements; (vi) provide training and education for traditional owners and users; (vii) develop Code of Ethics; (viii) issue advisory guidelines; (ix) liaise with regional bodies; (x) maintain record of traditional owners and knowledge; (xi) provide guidance on meaning of “customary use.”

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SANCTIONS AND ENFORCEMENT PROCEDURES	<p>Importation of copies of protected work into national territory constitutes an infringement and can be seized.</p> <p>Person infringing rights obliged to cease infringement; liable for damages; if willful be punishable by fine or imprisonment or both (Section 15(1)).</p> <p>Infringement of rights mentioned which are considered as violation of national cultural heritage and may be curbed by all legitimate means (Section 15(2)).</p> <p>Infringement materials subject to seizure (Section 15(3)).</p>	<p>Offences determined by enacting country (section 6).</p> <p>Seizure of objects which violate law (section 7).</p> <p>Fees collected used for purpose of safeguarding national culture. (section 10(3)).</p> <p>Omissions to acknowledge source in cases where required subject to fine (Section 6).</p>	No particular provisions for expressions of folklore	<p>The importation, smuggling, industrial reproduction of protected objects and other violations of the Law are prohibited and the proceeds of fines are shared with the respective indigenous community (Law, Articles 17 to 21).</p> <p>Apart from the affected indigenous communities, the regional governor or the country governor may take preventative action (Law, Article 22).</p>	<p>Various offences are created, punishable on conviction by fine or term of imprisonment, or both.</p> <p>Traditional owners may also institute civil proceedings.</p> <p>Remedies: injunction, damage for loss, public apology, cease or reverse false attribution of ownership or derogatory treatment, order for account for profits, seizure of objects, other.</p> <p>Nothing prevents recourse to mediation procedures, ADR, customary laws.</p>

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	Material proof of infringement may be provided by statements of police officers or certified statements of sworn agents of authors' organization (Section 15(4)).				
TERM OF PROTECTION	Without limitation in time (Section 6(2)).	No time limit stated.	Economic rights: lifetime of author + 70 years after death. Moral rights without limit in time. After expiry of economic rights, collective rights administrative body (Article 60) entitled to ensure compliance with moral rights. Anonymous author = 70 years after first publication or making of the work / lawfully accessible to public (Article 24).	Rights are indefinite (not unlimited) (Law, Article 7).	Moral rights and traditional cultural rights continue in force in perpetuity, are inalienable, and cannot be waived or transferred (Sections 9 and 13(4)).

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<p>INTERACTION WITH EXISTING IP LAWS</p> <p>(and other laws, such as cultural heritage laws)</p>	<p>Works derived from folklore are regarded as copyright works (Section 2).</p>	<p>Under section 12, there is no limit or prejudice to any protection applicable to expressions of folklore under other existing laws or other forms of protection provided.</p>	<p>Provides for the protection of expressions of folklore as copyright works and performances thereof as protected performances under related rights.</p> <p>However, <i>domain public</i> payment also provided for.</p> <p>Title II deals with cultural heritage and provides as follows:</p> <p>“Cultural heritage” concerns folklore, sites and monuments, and ensembles (Article 67). Under Article 68, “folklore” means literary, artistic, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation. Examples are given in Articles 68 to 71.</p>	<p>The Panamanian Copyright Act, 1984, does not provide copyright protection for “objective expressions of folklore” (Article 9).</p> <p>Also relevant are Law 27 of July 30, 1997 “Establishing the Protection, Promotion and Development of Handicraft” and Law No. 14 of May 5, 1982 “Enacting Measures on the Custody, Conservation and Administration of the Historical Heritage of the Nation.”</p> <p>The Law and Decree refer also to the Fiscal Code, customs law and the trademarks legislation</p>	<p>The Law does not affect rights existing immediately before the commencement of the law (in each country), including IPRs.</p> <p>Traditional cultural rights are in addition to and do not affect IP rights.</p> <p>IPRs in derivative works (tradition-based creations) vest in the IP holder under relevant IP laws. However, if a derivative work is commercialized, certain duties arise (see above).</p>

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			<p>Article 73 prohibits the “denaturing” (distortion), destruction, exploitation, sale, disposal and illegal transfer of any part or a part of the property that makes up the cultural heritage except with authorization by competent authority (Article 73)(1)).</p> <p>Under 73(2), the following acts are prohibited when undertaken for profitable purposes:</p> <ul style="list-style-type: none"> (i) publication, reproduction, distribution of copies of cultural property; and (ii) recitation, public performance, transmission by wire or wireless means and any other form of communication to the public. <p>Several limitations to these rights are provided for, notably the borrowing of cultural heritage for the creation of original works (Article 74 (1)(c)).</p>		

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			States shall inventorize, determine, classify, place in security and illustrate the elements that make up the cultural heritage (Article 72). Establishment of a High Commission for the Cultural Heritage (Article 97), to be consulted on all matters concerning the protection, safeguard and promotion of cultural heritage.		
CUSTOMARY LAWS AND PROTOCOLS	No reference.		No reference	Registration does not affect the traditional exchange of the object of knowledge between indigenous peoples (Decree, Article 11).	In case of dispute, customary laws and practices can be applied as a means to resolve the dispute.

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REGIONAL AND INTERNATIONAL PROTECTION (including the question of the protection of the same or similar cultural expressions from neighboring countries (so-called “regional folklore”)).	<p>Copies, adaptations etc of works of national folklore made abroad without authorization, shall not be imported or distributed in national territory (Section 6(3)).</p> <p>Section 16 (2) Alternative X – law applies to all works which, by virtue of treaties entered into by the country, are to be protected, as well as to works of national folklore.</p> <p>Alternative Y adds further application of the law to include national folklore of countries promulgated.</p>	<p>Subject to reciprocity (Section 14 (i)).</p> <p>Basis of international treaties or other agreements (Section 14 (ii)).</p>	<p>Article 3 (1): Rights relating to the fields of intellectual property, as provided for in the Annexes to the Agreement, are independent national rights subject to the legislation of each of the Member States in which they have effect.</p> <p>Article 4 (2) - the Agreement and Annexes applicable in their entirety to every State that ratifies or accedes to the Agreement.</p>	<p>Artistic and traditional expressions of other countries have the same benefits of law, when made by means of reciprocal international agreements (Law, Article 25).</p> <p>The importation of non-original reproductions of protected objects is prohibited (Article 17).</p>	<p>In accordance with reciprocal arrangements, Act provides same protection to TK and expressions of culture originating in other countries or territories as is provided within the country itself.</p>

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TRANSITIONAL ARRANGEMENTS	No particular provisions relating to folklore.	<p>No specific transitional rules.</p> <p>Depends on the laws of the individual countries.</p> <p>Legislator may choose either:</p> <ul style="list-style-type: none"> (i) retroactivity of law (ii) non-retroactivity of law (iii) intermediate solution = utilization subject to authorization under law but commenced without authorization before entry into force of laws should be brought to end before expiry of certain period if no relevant authority obtained by user in meantime. (Commentary to the Model Provisions). 	<p>Provisions apply to works that were created, to performances that took place, or were fixed etc. prior to the date of entry into force of Annex VII, on condition that such works have not yet fallen into public domain by reason of expiry of term of protection enjoyed under preceding legislation (Article 66 (1)).</p> <p>Legal effects of acts and contracts concluded or stipulated prior to date of entry into force of Annex remain unaffected (Article 66 (2)).</p>	The Law provides that rights accorded previously under the relevant legislation shall be respected and shall not be affected.	<p>The Law applies to expressions of culture that were in existence before the commencement of the Act (in the relevant country) and those created on or after that commencement (Section 3).</p> <p>The Law does not affect existing IP (as noted above) nor existing contracts and licenses (Sections 3(2) and 3(3)).</p> <p>Persons making non-customary uses of cultural expressions at the time the Act comes into force (in the relevant country) have 60 days to apply for the required consent under the Act (Section 35).</p>

[End of Annex II and of document]