

■ Topic 10 – TCEs: Existing Protection, Gaps and Approaches to Fill the Gaps

WIPO Practical Workshop

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Geneva, Switzerland
3–5 December 2014

Introduction

- **What** are traditional cultural expressions / expressions of folklore?
 - when is creativity “traditional”?
- **Why** do we want to protect them?
 - to prevent their misappropriation?
 - to benefit economically from them?
- **How** can we protect them?
 - existing IP systems?
 - adapted/new IP systems?
- For **whose** benefit?
 - Communities? the State? local enterprises? individuals?

What are TCEs?

- Traditional cultural expressions / Expressions of folklore
- Some examples...?
- What characteristics do they have in common?
- How could we define them?

Examples

- Songs, dances, handicraft, theater, rituals, drawings, paintings, stories, poems, legends, designs, architecture...

Characteristics of traditional cultural expressions

- elements of cultural heritage
- any *form* in which traditional culture is manifested, expressed
- transmitted from generation to generation
- characteristic of a community's identity and cultural heritage
- developed/used/maintained by that community

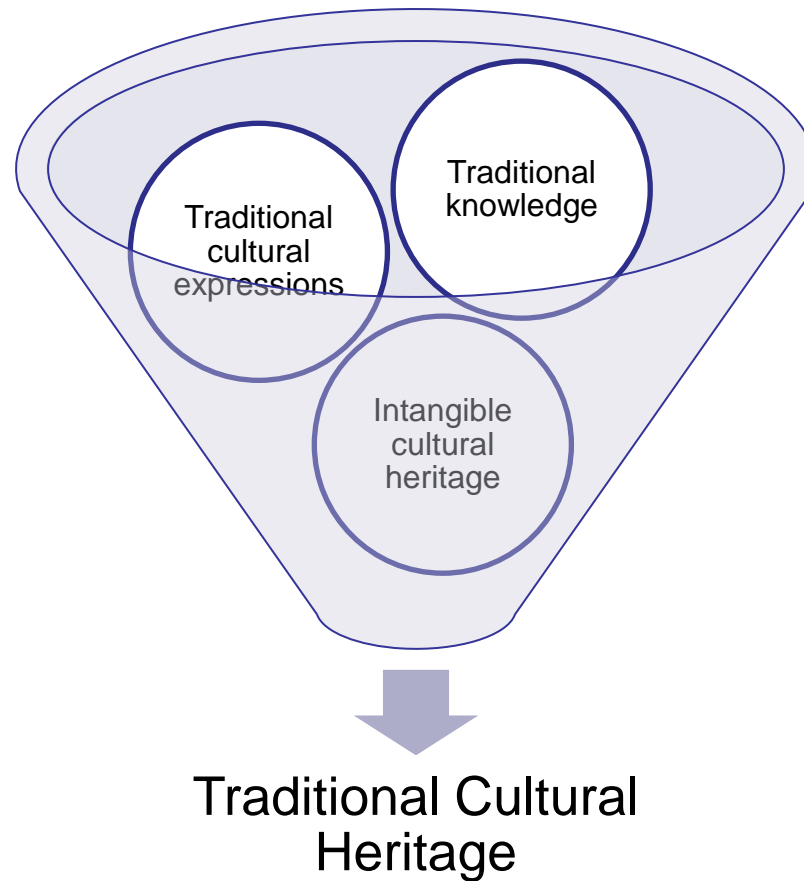
An artificial distinction

...the images on the shroud functioned as a calendar of farming seasons...

Pop Quiz

- Which of these is probably not a TCE?
 - The traditional irrigation system used for generations by one community
 - The designs on the handle of an axe used to harvest a medicinal plant
 - The song traditionally performed during fishing expeditions

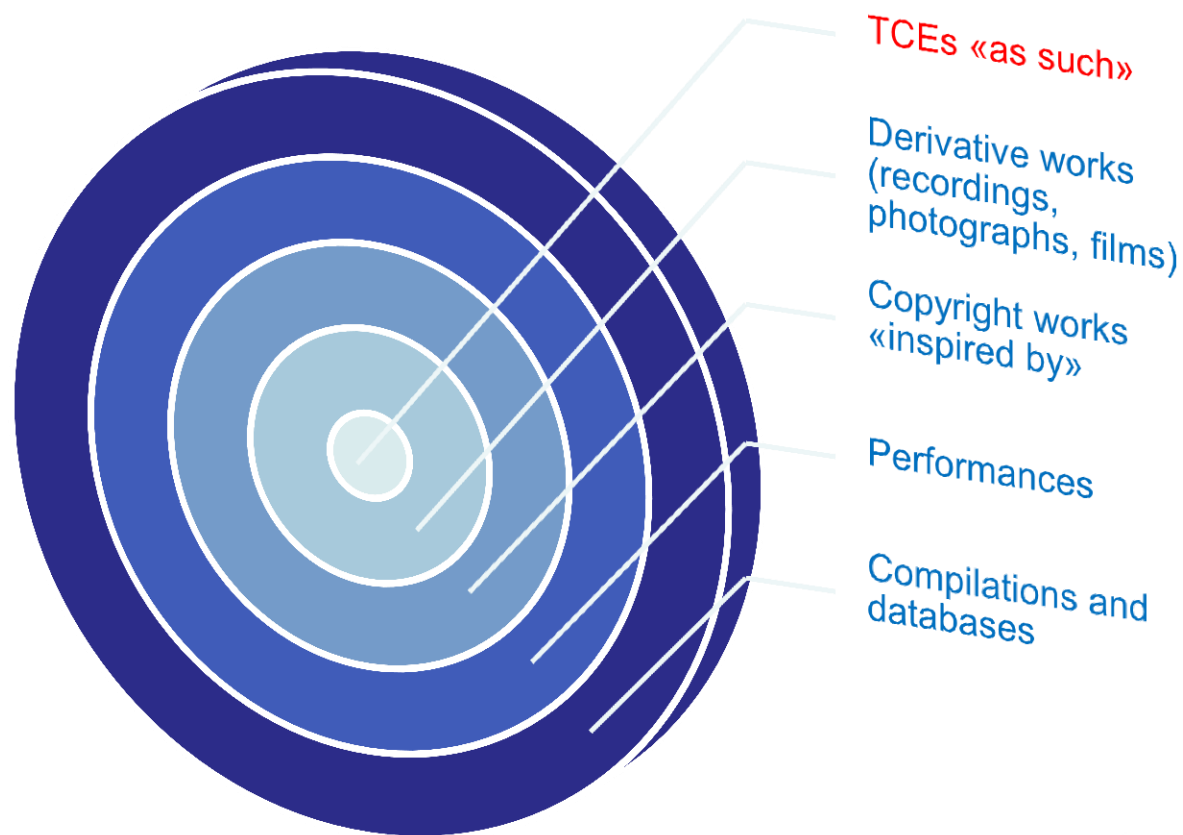
Traditional cultures



A working description of TCEs

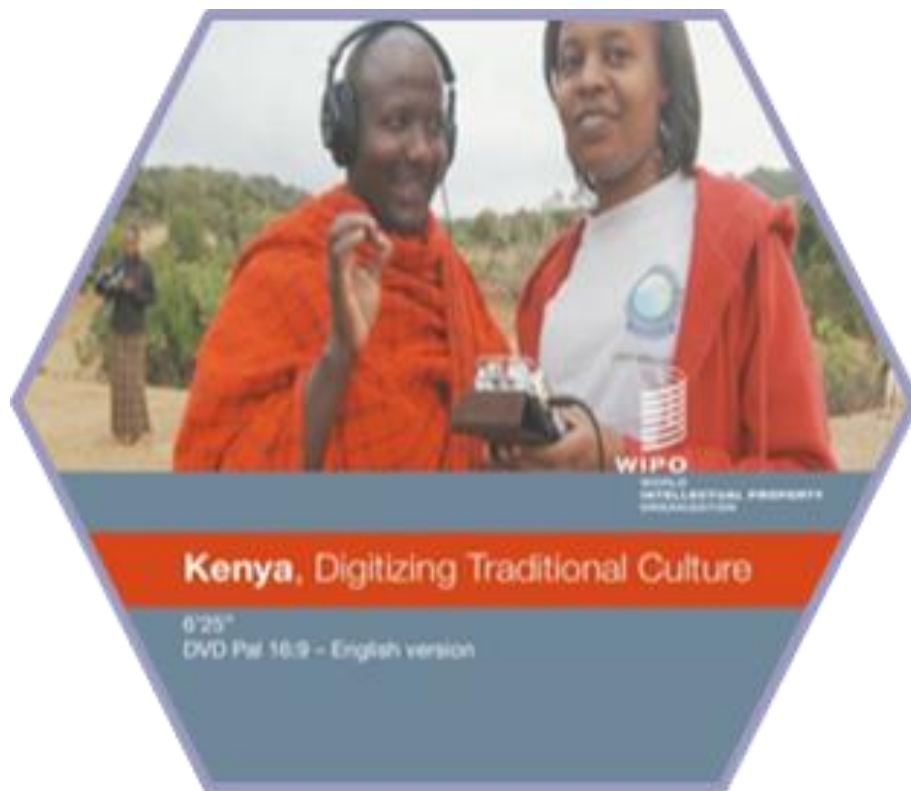
- TCEs are creative expressions of **indigenous peoples and local communities**
- They are products of creative intellectual activity; so they are “intellectual property”
- They can, to some extent, be protected by IP law
 - Copyright and related rights
 - Trademarks
 - Designs
 - Etc.

Aspects protected by current copyright



Aspects protected by current copyright

- Copyright/related rights protection for **derivative works** (photographs, audiovisual works, adaptations, recordings...)



Aspects protected by current copyright

- Copyright protection for **contemporary** creations
 - based on
 - inspired by
 - borrowing from...



WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

Aspects protected by current related rights

- performers of expressions of folklore (WPPT, Beijing Treaty)

“Gaps” in current copyright law

- originality requirement
- limited term of protection
- need to identify the creator of a work (the individual author)
- exceptions and limitations allow certain uses by third parties (not perfect control)
- performers’ rights will only protect an individual’s performance
- ...

Pop Quiz

- Which of the following cannot be protected by copyright law?
 - A tapestry depicting a traditional legend
 - A song inspired by traditional music
 - The recipe for a traditional cure for headaches
 - A film of a traditional ceremony performed by several members of a community
 - A traditional textile pattern, unchanged for centuries

Aspects protected by current trademark law

- Reputation and goodwill associated with TCEs

“Gaps” in current trademark law

- used in the course of trade (commercialization)
- first come, first serve
- public order or morality principles (offensive)
- “use” of trademark by others

Pop Quiz

- What could be protected under trademark law?
 - The name of a community, used in association with its unique handicraft, for sale on the internet
 - A drawing depicting a traditional house, used as decoration in a classroom
 - A six-note tune, inspired by a traditional song, used in association with the promotion of community films

Aspects protected by current industrial designs law

- outward appearance

Aspects protected by current geographical indications law

- Craft products = specific manufacturing skills and traditions that derive from their place of production

Olinala lacquered wood

Existing IP laws: pockets and gaps

- Conventional IP mechanisms can protect contemporary, tradition-based creativity of current generations of communities
- But since they are “**traditional**”, and due to inherent inadequacies of the system, TCEs *as such* cannot be fully protected by existing IP systems
- Until recently, TCEs were considered as belonging to the common heritage of humanity... in the “**public domain**”

TCEs and the public domain

- What is in the public domain?
 - IP protection term has expired
 - material was never protectable
 - ...
- Can be used by anyone for any purpose

- TCEs as such are often considered as being in the **public domain** from a conventional IP perspective

- However, many TCE custodians strongly criticize this characterization, arguing that their TCEs are protected by **indigenous and customary laws** and are not therefore in the public domain

Today, growing awareness of...

- The risk of **erosion** of local cultures
- The **economic** potential – for communities and industries
- Their value as **cultural** “assets” – part of social and cultural identity
- **Vulnerability** to misuse and misappropriation

Pop Quiz

Which of these could be examples of misappropriation?

- Use without prior informed consent and/or involvement
- Failure to acknowledge source
- Unauthorized access to sacred and secret material
- Derogatory use
- Failure to share benefits
- TCEs becoming subject to an IP right

- Indigenous peoples, local communities and many States call for the greater **protection**, safeguarding, preservation and promotion of TCEs

**Need for a new form of
protection**

What is protection?

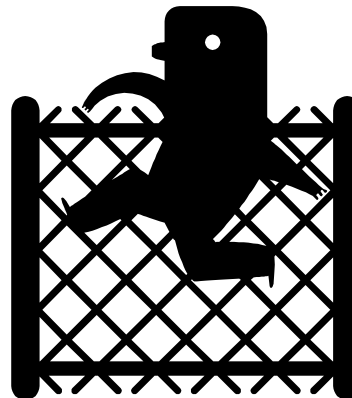
■ Preservation



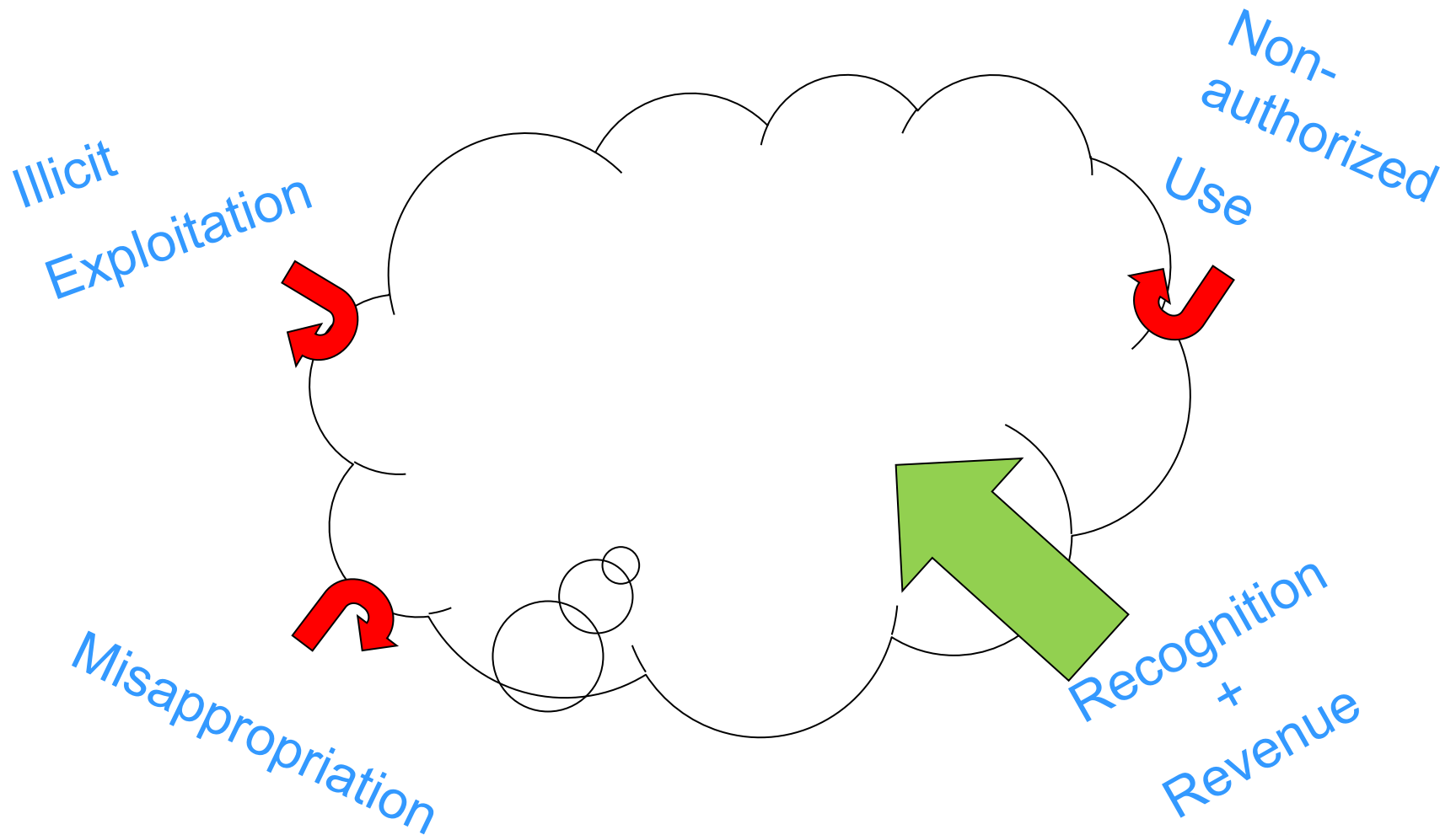
■ Safeguarding



■ IP protection



What is intellectual property protection?



Objectives of IP protection

support economic
development

prevent unwanted use

protection against IP

What is IP protection?

- **Objective:** make sure that is not “wrongly” used
- TK and TCE holders can **control access and use** by third parties
- IP ≠ **perfect control**
 - limitations and exceptions
 - limited term
 - public domain
- **Balance:** competing interests of producers and users of TCEs

Sui generis IP protection of TCEs

- TK and TCEs would be recognized as a form of “intellectual property” – i.e., as comprising creations and innovations of the human mind
- The protection of TK and TCEs would be provided by a special system or mechanisms based on the kinds of measures, principles and values that underlie the system established for the protection of intangibles (the intellectual property system)

Some key issues of a *sui generis* system

- **Why protect? *Aims and objectives***
 - **What to protect? *Subject matter***
 - **Who should benefit? *Beneficiaries***
 - **What acts should be forbidden? *Scope***
 - **Should there be exceptions and limitations?**
-
- For how long? *Duration*
 - Should there be formalities?
 - What sanctions or penalties apply?
 - Should rights be retrospective?
 - How should foreign right holders be treated?

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













**Twenty-Eighth Session
Geneva, July 7 to 9, 2014**

**THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS:
DRAFT ARTICLES**

Document prepared by the Secretariat

The Protection of Traditional Cultural Expressions: Draft Articles

Document Code	WIPO/GRTKF/IC/28/6
Meeting Code	WIPO/GRTKF/IC/28
Publication Date	Jun 2, 2014

English	The Protection of Traditional Cultural Expressions: Draft Articles <i>Document prepared by the Secretariat</i>		
	Complete document		330 KB
	Complete document		305 KB
Français	La protection des expressions culturelles traditionnelles : projets d'articles <i>Document établi par le Secrétariat</i>		
	Complete document		286 KB
	Complete document		289 KB
Español	La Protección de las Expresiones Culturales Tradicionales: Proyecto de Artículos <i>Documento preparado por la Secretaría</i>		
	Complete document		280 KB
	Complete document		360 KB
عربي		<i>حماية أشكال التعبير الثقافي التقليدي: مشروع مواد من إعداد الأمانة</i>	
		Complete document	
	Complete document		442 KB
中文	保护传统文化表现形式：条款草案 <i>秘书处编拟的文件</i>		
	Complete document		236 KB
	Complete document		352 KB
Русский	ОХРАНА ТРАДИЦИОННЫХ ВЫРАЖЕНИЙ КУЛЬТУРЫ: ПРОЕКТЫ СТАТЕЙ <i>Документ подготовлен Секретариатом</i>		
	Complete document		336 KB
	Complete document		322 KB

[ARTICLE 1] [ELIGIBLE]/[ELIGIBILITY CRITERIA FOR] SUBJECT MATTER OF [PROTECTION]/[SAFEGUARDING]

The subject matter of [protection]/[this instrument] is traditional cultural expressions:

- (a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities [or nations] [whether they are widely spread or not]; [and]/[or]
- (b) that are [the unique product of] [directly] [linked with]/[distinctively associated with] the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations]; [and]/[or]
- (c) that are transmitted from generation to generation, whether consecutively or not; [and]/[or]
- (d) [that have been used for a term as has been determined by each [Member State]/ [Contracting Party] [but not less than 50 years]]; [and]/[or]
- (e) [that are the result of [creative intellectual activity]/[creative activity of the intellect]]; [and]/[or]
- (f) which are/may be dynamic and evolving.]



Thank you!

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