

Comments on the List of Issues from Japan (TCEs/EoF)

[General Remarks]

Japan recognizes that the issue of traditional cultural expressions (TCEs)/expressions of folklore (EoF) is important for many member States. However Japan believes that the depth of understanding among the member States on this issue is still insufficient for any kind of agreement at the international level to be formed. Therefore, as the first step to deepening our understanding of TCEs/EoF, we welcome fundamental discussions based on the Lists of Issues. In discussing the List of Issues, we believe that it is useful to discuss fundamental issues, such as the definition or the content of certain terms. We wish to point out that there are some issues that cannot be resolved because these fundamental issues are still unclear. Even before attempting to finalize the details of the wordings of certain terminology, what is more problematic is the lack of formation of common understandings or common perception as to what such words should mean. Arguing, however, that under these circumstances, it is impossible to agree on the detailed wording of definitions or that the definitions should be left to the national laws of member States is a failure in facing up to the problem squarely.

The List of Issues contains words such as "rights" and "protection", but at this stage, there is no consensus on establishing any new rights or forms of protection. We may use and touch on these words in the course of discussing each individual issue, but such usage is not indicative of Japan's positions on the formulation of any new "rights" or "protection". Of course we are aware that there are some pre-existing rights under customary laws and that they should be respected. However, even in such cases, we must point out that rights recognized by customary laws in certain states or regions are not necessarily recognized in other jurisdictions.

Japan submits the following comments on each issue. We will reserve further comments if necessary.

[Details]

1. Definition of traditional cultural expressions (TCEs)/Expressions of Folklore (EoF) that should be protected.

The expression “traditional cultural expressions/expression of folklore” gives us a rough idea of its general meaning, but from a legal perspective, the expression still remains very vague. Below we will point out the problems we see in current existing attempts to define TCEs/EoF. This is for the purpose of illustrating issues necessary to deepen understanding.

WIPO/GRTKF/IC/6/3 (Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options) paragraph 50 lists the common elements that appear in definitions of TCEs/EoF in national laws of member States as below:

- (i) are handed down from one generation to another, either orally or by imitation,
- (ii) reflect a community’s cultural and social identity,
- (iii) consist of characteristic elements of a community’s heritage,
- (iv) are made by ‘authors unknown’ and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so,
- (v) are constantly evolving, developing and being recreated within the community.

With regard to these common elements, problems and difficulties as below have been pointed out from time to time, but the international community has never been able to come to a common understanding to this date.

- (1) The range of the meaning of certain words and the scope of public domain: It is not clear how words such as “traditional”, “handed down from one generation to another”, “heritage” and “characteristic” are rigidly interpreted and applied. Rather the meanings of these words cover a wide range of spectrum. There are traditional cultural expressions that are handed down only to certain individuals within a small community through strict rituals, and there are also traditional cultural expressions in a wider sense, such as those that have taken root as part of the national traditional culture of a country among its citizens in general, and are used by city dwellers and may be at times even be used commercially. Among these, the criteria that divide those that are protected from those that are

not are unclear. Applying these words too loosely would bring about a fear of according intellectual property protection to traditional culture in general. Such consequence is not appropriate, as it would unfairly limit the public domain. On the other hand, if we were to rigidly interpret the meaning of these words and limit the scope of protection, we would need a justifiable explanation as to why certain types of expressions are protected while others are not.

- (2) Criteria to fall under public domain due to uses outside the community: It is understood that TCEs/EoF falls under public domain once it has lost its link with a certain community. However it is unclear what extent of uses outside the community would be sufficient to render a TCE/EoF to be in the public domain. Geographically, it is unclear how much the use should expand outside the community for a TCEs/EoF to be in the public domain. Time-wise, it is unclear as to how long the TCEs/EoF should be used by non-community members for it to fall in the public domain. It is inappropriate to deny public domain status to TCEs/EoF that have been used outside the community for centuries in the past, as this would lead to the denial of the fruit of cultural development through cultural exchange.
- (3) Non-traditional cultural expressions: It is unclear why non-traditional cultural expressions that have fallen under the public domain should not be protected while traditional cultural expressions are. WIPO/GRTKF/IC/5/3 paragraph 42(c) lists examples such as works by Shakespeare, heritage of Greek, Egyptian and Roman cultures and poses a question "Should 'traditional' creations enjoy a privileged status vis-à-vis other public domain 'non-traditional' creations?" This question is still unanswered.
- (4) TCEs/EoF "that should be protected": There is a view that the meaning of the expression TCEs/EoF can be made clear if requirements for protecting TCEs/EoF are clearly established, even if the meaning of the expression TCEs/EoF itself is vague. However it should be noted that no consensus about "protection" has yet been reached. The following opinions about the List of Issues are just for the purpose of discussion and this does not mean that Japan agrees to start discussing the listed issues for any other purpose than for clarifying issues.

The criteria for TCEs/EoF that should be protected" is inextricably linked with the criteria for judging what benefits society can enjoy by the

protection of TCEs/EoF. Will the TCEs/EoF be made widely available to the public (as are patents and copyrights) with the aim of enhancing technology and culture for succeeding generations? Or, will the maintenance of TCEs/EoF itself be regarded as serving the public interest? Taking into all these questions into account, discussions should focus on public interest and the return of benefits to the society. Without discussing such public interest, it will not be made clear if any protection is necessary or what should be protected.

The subject matter of protection may vary by the form/level of protection. The level of protection required to ensure that TCEs/EoF is respected can cover a substantially wide range of cultural expressions. If the level of protection is that of granting an exclusive right, the scope of the subject matter will be greatly narrowed. In addition, levels such as granting a right to remuneration or providing government subsidies for its conservation are also conceivable.

To clarify the expression "TCEs/EoF that should be protected," the discussion about public interest, identification of existing problems, and practical needs for protection is indispensable.

- (5) Definition of "Community": This will be discussed under the next item 2.

2. Who should benefit from any such protection or who hold the rights to protectable TCEs/EoF?

It is unclear what social prerequisites are necessary for a group to be qualified as a "community", which will be the beneficiary of protection. Points that lack clarity are as below:

- (1) Community with regard to TCEs/EoF of indeterminable origin: There are many TCEs/EoF whose origin is indeterminable. There are cases where the community that should enforce its rights to receive benefit cannot be determined or where more than one community claim to be the origin of a traditional cultural expression.
- (2) Community with regard to "regional folklore": It is unclear how to treat cases of "regional folklore", where a community spreads across national borders.

- (3) Community with regard to "national folklore": Usually, the word "community" implies a certain level of actual communal living. However, when it is interpreted that nationals of an entire country may be deemed a "community" and can claim ownership of a "national folklore", the condition of actual communal living becomes so relaxed as to be non-existent. This is tantamount to saying that TCEs/EoF can be so broad as to include any expression related to a nation's custom or tradition. There is a need to clarify the relationship between "community" and the conditions of "communal living" or the condition of "being handed down".
- (4) Traditional communities that are not founded on kinship: It is not clear if the succession of TCEs/EoF over generations by such a community as a religious community, which is not founded on kinship, can be regarded as a beneficiary community. We cannot see any justifiable grounds for an organization which is firmly united to not be deemed as a beneficiary just because the organization members are not biologically related while a loosely united community such as a country (as in the case of "national folklore") is regarded as an eligible beneficiary. WIPO/GRTKF/IC/5/3 paragraph 42 (d) reads, "Is the creation of a sui generis IP regime for certain communities (such as indigenous or local peoples, as against all other "non-indigenous" or "non-local" persons) acceptable as a matter of policy?". This question remains unanswered.
- (5) Contemporary communities: There are other forms of communities not founded on kinship such as Internet communities. Members of these communities do not live together. The communities have not lasted for more than one generation; the members of these communities gather together for the same purpose or because of sharing the same idea. Certainly, these communities are not traditional communities and are not considered as beneficiary communities under the traditional definition. However, why these communities should be unfairly discriminated against in comparison with traditional communities is not clear.
- (6) Communities of immigrants: The question of how to treat TCEs/EoF of immigrants (as opposed to TCEs/EoFs of the indigenous people) has been occasionally raised. However this question remains unanswered.

There are also problems with the benefit sharing mechanism such as below, and it seems difficult for the mechanism to actually work.

- (1) There would be many cases where the community cannot exercise its rights against outside parties even when it tries to do so, due to lack of a clear decision making mechanism or representative in the community. Especially in the case of "national folklore", whose owner is the nationals of a whole country, it is unclear who holds the right for authorization.
- (2) Some have proposed that the State may exercise rights in proxy for internal communities. However some groups of indigenous peoples are opposed to this and there is no consensus. When States are allowed to act as beneficiaries in proxy for indigenous peoples, there is a problem of whether the State will act to truly represent the welfare and benefit of the indigenous peoples.
- (3) There is no clear idea of how the benefit will be shared within the community.

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

There is an opinion that IP right protection should be extended to TCEs/EoF to acknowledge its commercial value. This opinion, however, does not clear in identifying any justifiable reasons why TCEs/EoF should be eligible for such protection. If the purpose of the IP protection of TCEs/EoF is to correct the inequities in economic development or to ensure sustainable development of certain communities by providing a new financial resource, a discussion should be conducted as to whether or not IP protection of TCEs/EoF is an appropriate way to achieve these purposes in the first place. Also, attention should be paid to the fact that protection of TCEs/EoF is not simply a matter of economic policy and its ramifications in terms of impact on cultural development are quite large.

Currently, the main purpose of an IP protection system is to give incentive to creators by protecting their creations and to vitalize culture and society. In this context, the right for protection should be valid for only a limited period of time to encourage use by third parties for further development and to secure the balance between the interests of right holders and public interests. However it might be problematic to enable only a certain

generation to enjoy the benefits derived from TCEs/EoF that has long been passed down. Moreover, there will be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the TCEs/EoF. On the other hand, from the viewpoint of public interests, it is also inappropriate to grant an IP right that will stay valid forever as it unfairly limits the scope of public domain.

There is another opinion that TCEs/EoF should be protected as moral rights considering values that have long been fostered in an indigenous population or local community. If moral rights protection is made applicable to TCEs/EoF, right holders should be protected against any acts infringing their moral rights. However, what acts constitute such moral rights infringement has yet to be clearly defined. Use of TCEs/EoF that inflict mental suffering upon a community should be refrained from, as a matter of moral in general in the same way that derogatory expressions against certain race, religion or sex should be refrained from. However one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development of culture. For serious moral right infringements, protection under the Civil Code or other general laws may be applicable even if no IP right protection is available.

4. What forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?

Unacceptable/illegal acts may vary depending on the form of protection for TCEs/EoF. As mentioned in the above item 3, there is no clear justifiable reason why TCEs/EoF is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to TCEs/EoF. Use of TCEs/EoF that inflict mental suffering upon a community should be refrained from, as a matter of moral in general in the same way that derogatory expressions against certain race, religion or sex should be refrained from. However one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development

of culture. Moreover, when defining unacceptable/illegal acts, a fact finding survey should be conducted to find out what damage is incurred by what acts.

5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?

As mentioned in the above item 3, any justifiable reasons for IP right protection to be extended to TCEs/EoF are not clearly identified and sufficiently explained. In this respect, Japan has a serious concern. Japan is not in a position to enter into discussion based on right or protection, but in discussing exceptions and limitations, consideration should be given to the balance between the interests of right holders and public interests although such balance may vary by the form of protection and the scope of illegal acts.

6. For how long should protection be accorded?

As mentioned in the above item 3, any justifiable reasons why IP right protection should be extended to TCEs/EoF are not clearly explained. In this respect, Japan has a serious concern. Japan is not in a position to enter into discussion on term of protection, but when discussing the term of protection of an IP right, consideration should be given to the balance between the interests of right holders and public interests although such balance may vary by the form of protection and the scope of illegal acts.

7. To what extent do existing IPRs already afford protection? What gaps need to be filled?

To date, there has been no IP system around the world which extends direct protection to TCEs/EoF. In certain limited cases, however, TCEs/EoF can be protected under such existing systems as copyright law, trademark law, or unfair competition prevention law systems. Still, the following problems will remain.

Protection under copyright law

In order to be protected by copyright, a certain level of originality is necessary. Also, the holder of right is basically presumed to be an individual, and although there are systems of joint ownership of copyright or copyright owned by legal

entities, it is not presumed that the a community directly becomes a copyright holder. Performance of TCEs/EoF can be subject to protection by neighboring rights, even if the performed TCEs/EoF itself does not qualify as a copyrighted work. Term of protection is limited both for copyright and neighboring rights.

Protection under trademark law

A trademark right is aimed at protecting signs used for goods and services by entrepreneur but not cultural expressions such as TCEs/EoF. Indirect protection of protection of TCEs/EoF under a trademark right might be possible. More specifically, if a trademark right might be able to be granted to a mark of group to which the TCEs/EoF belongs, a brand can be established using the mark of the group.

In addition, with regard to protection of moral rights, copyright law can provide moral rights protection where the TCEs/EoF qualifies as copyrighted work, and civil code or other general laws may also provide protection in cases of serious moral right infringements.

In conclusion, a fair balance has been kept between the protection of TCEs/EoF and the protection of public domain under the IP system and other laws. At this stage there is no perceivable gap between the current system and the necessary forms/level of protection.

8. What sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal?

Sanctions/penalties against unacceptable/illegal acts may vary depending on the level of protection for TCEs/EoF and the level of illegality. As mentioned in the above item 3, there is no clear justifiable reason why TCEs/EoF is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to TCEs/EoF. A fair balance has been kept between the protection of TCEs/EoF and the protection of public domain under the IP systems and other laws. Japan is not convinced that there is a need to introduce any other sanctions/penalties than those that have been already adopted under the existing systems. Japan does not believe that such a discussion is unnecessary, but when discussing what sanctions/penalties should be introduced,

consideration should be given to the form of protection for TCEs/EoF and the scope of illegal acts. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

As mentioned in the above item 3, any justifiable reasons for IP right protection to be extended to TCEs/EoF have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TCEs/EoF as well as about creating a legally binding international instrument that obligates member States to establish such regime.

Before discussing ways of internationally addressing this issue, discussions must be conducted on what domestic solutions exist and where their limits lie, and the extent to which contracts, etc. are incapable of addressing this issue. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

10. How should foreign rights holders/beneficiaries be treated?

As mentioned in the above item 3, any justifiable reasons why IP right protection should be extended to folklore have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TCEs/EoF, as well as about creating a legally binding international instrument that obligates member States to establish such a regime. Treatment of foreign rights holders and beneficiaries would depend on the type of protection TCEs/EoF would be granted and the corresponding international regulations.

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