

COMMENTS BY AUSTRALIA

(MARKED IN REVISION MODE)

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

DRAFT

GAP ANALYSIS ON THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE

Document prepared by the Secretariat

At its twelfth session, which took place from February 25 to 29, 2008, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore agreed that the WIPO Secretariat should make available in draft form a document constituting a gap analysis on the protection of traditional cultural expressions/expressions of folklore. According to the Committee's decision, participants in the Committee would have the opportunity to comment on the draft before June 30, 2008, after which a final draft of the document would be published by August 15, 2008 for consideration by the Committee at its thirteenth session. This document is the draft referred to. Comments on this preliminary draft may be transmitted to the Secretariat by June 30, 2008. The gap analysis, with amendments and additions as required, will then be circulated as document WIPO/GRTKF/IC/13/4(b) for the further review of Member States and observers at the thirteenth session of the Committee, which will take place from October 13 to 17, 2008. Committee participants are encouraged to submit their comments by email to grtkf@wipo.int

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I. INTRODUCTION

1. At its twelfth session in February 2008, the Intergovernmental Committee (IGC) decided as follows with respect to TCEs:

“... the Secretariat will, taking into account the previous work of the IGC, prepare, as the working document for the next session of the IGC, a document that will:

- (a) describe what obligations, provisions and possibilities already exist at the international level to provide protection for TCEs/EoFs;
- (b) describe what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples;
- (c) set out considerations relevant to determining whether those gaps need to be addressed;
- (d) describe what options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level;
- (e) contain an annex with a matrix corresponding to the items mentioned in subparagraphs (a) to (d) above.

The Secretariat will make explicit the working definitions or other bases upon which its analysis is conducted.

This document will be made available by the Secretariat in draft form by May 31, 2008. Participants in the Committee will have the opportunity to comment on the draft before June 30, 2008, after which a final draft of the document will be published by August 15, 2008 for consideration by the Committee at its thirteenth session.”

2. More generally, the Committee’s work on TCEs is being undertaken on two related and complementary tracks:

(i) consideration of an agreed List of Issues concerning the protection of TCEs/EoF; and

(ii) consideration of a draft set of “Revised Objectives and Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore” (“Objectives and Principles”).

3. Documents related to these two tracks remain available at this session of the Committee, in particular WIPO/GRTKF/IC/12/4(a), WIPO/GRTKF/IC/12/4(b), WIPO/GRTKF/IC/12/4(c), and WIPO/GRTKF/IC/12/6.

II. REFERENCES AND OTHER MATERIALS USED FOR PREPARATION OF THIS ANALYSIS

4. Much of the information contained in this document has been drawn from IGC documents¹ and other publications and materials previously written for purposes of the work of the IGC.² In particular, attention is drawn to document WIPO/GRTKF/IC/6/3. These documents and materials are all available on WIPO's website at <http://www.wipo.int/tk/en/folklore/>. Several other publications and articles have also been consulted.³

III. WORKING DEFINITIONS AND OTHER BASES UPON WHICH THE ANALYSIS IS CONDUCTED

Traditional cultural expressions

5. There is no internationally settled or accepted definition of a "traditional cultural expression" or "expression of folklore" (both terms will be used interchangeably in this document and abbreviated to "TCEs"). There are, however, many definitions in national and regional laws and in international instruments.⁴ The draft provisions being discussed by the IGC (the "TCE Draft Provisions") also contain a draft description of TCEs.⁵ Defining the subject matter of protection has long been one of the most fundamental challenges associated with the protection of TCEs. How TCEs are defined can determine the extent to which and how they may be protected by IP.

6. It is not the purpose of this document to suggest a single definition or even suggest that a definition is necessary at the international level, a question on which participants in the IGC have different views. However, for purposes of this analysis only, it is useful to delineate what is meant by the term "traditional cultural expression".

¹ WIPO/GRTKF/IC/3/10; WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/5/INF/3; WIPO/GRTKF/IC/6/3 and 6/3 Add.; WIPO/GRTKF/IC/7/3; WIPO/GRTKF/IC/9/INF/4; WIPO/GRTKF/IC/11/4(a), (a) Add. and (a) Add. 2; WIPO/GRTKF/IC/11/4(b); WIPO/GRTKF/IC/12/4(a), (b) and (c).

² WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, 2004; Janke, "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions", WIPO, 2003; Kutty, "National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions – India, Indonesia, the Philippines", WIPO, 2004.

³ McDonald, I., Protecting Indigenous Intellectual Property (Australian Copyright Council, Sydney, 1997, 1998); Palethorpe and Verhulst, "Report on the International Protection of Expressions of Folklore Under Intellectual Property Law" (Study Commissioned by the European Commission), October 2000; "Protecting Traditional Cultural Expressions: Policy Issues and Considerations from a Copyright Perspective", policy paper by Canadian Heritage, 2004; Lucas-Schloetter, 'Folklore' in von Lewinski, S. (Ed.), *Indigenous Heritage and Intellectual Property*, 2004.

⁴ WIPO/GRTKF/IC/3/9; WIPO/GRTKF/IC/9/INF/4. See also laws database at <http://www.wipo.int/tk/en/laws/folklore.html>

⁵ WIPO/GRTKF/IC/12/4(c), Article 1.

Characteristics of TCEs

7. The characteristics of TCEs have been discussed at length in earlier documents and materials.⁶

8. For purposes of this analysis, two points may be recalled. First, TCEs may comprise truly old and pre-existing materials that were once developed by “authors unknown” through to the most recent and contemporary expressions of traditional cultures, with an infinite number of incremental and evolutionary adaptations, imitations, revitalizations, revivals and recreations in between. A distinction may, therefore, be made between pre-existing TCEs (perhaps “TCEs *stricto sensu*”) and contemporary interpretations and adaptations of them. Second, while traditional creativity is a dynamic interplay between collective and individual creativity, the defining characteristic of “traditional” creations is that they identify a living tradition and a community that still bears and practices it. Even where an individual has developed a tradition-based creation within his or her customary context, the creation is not “owned” by the individual but falls within a shared sense of communal responsibility, identity and custodianship. This is what marks such a creation as “traditional”. TCEs might well have had an author at some stage, but that author is now unknown or simply unlocatable.

9. In summary, TCEs in general (i) are the products of creative intellectual activity, (ii) have been handed down from one generation to another, either orally or by imitation, (iii) reflect a community’s cultural and social identity, (iv) consist of characteristic elements of a community’s heritage, (v) are made by authors unknown and/or unlocatable and/or by communities, (vi) are often primarily created for spiritual and religious purposes, and (vii) are constantly evolving, developing and being recreated within the community.

Forms of TCEs

10. TCEs could conceivably include a wide range of tangible, intangible and mixed forms of creative expression. The draft description in the TCE Draft Provisions contains a non-exhaustive list of more than 35 expressions clustered into four categories.⁷

11. It is proposed, however, that this analysis be as focused and concrete as possible by honing in on certain specific TCEs which appear to be the most vulnerable to IP-style exploitation. Previous materials have identified and discussed actual examples of the appropriation and misappropriation of TCEs.⁸ These examples have referred to the exploitation of traditional music and songs, visual art (notably painting), traditional musical instruments, designs and “styles” embodied in handicrafts and other creative arts, performances of TCEs, sacred and secret TCEs, recordings and documentation of TCEs, and indigenous words, names and symbols.

12. These examples demonstrate that the exploitation of TCEs may refer to protection of (i) the creative and distinctive expressions themselves; and/or (ii) the reputation or distinctive character associated with them; or (iii) their method of manufacture (in the case of handicrafts, musical instruments and textiles, for example).

⁶ WIPO/GRTKF/IC/6/3; WIPO, Consolidated Analysis.

⁷ Article 1, WIPO/GRTKF/IC/12/4(c).

⁸ WIPO/GRTKF/IC/5/3; WIPO, Consolidated Analysis.

13. With this background, it is proposed to focus this analysis on concrete examples falling within the first two categories mentioned, as follows:

- (i) literary and artistic productions, such as music and visual art;
- (ii) performances of TCEs;
- (iii) designs embodied in handicrafts and other creative arts;
- (iv) secret TCEs; and
- (v) indigenous and traditional names, words and symbols.

14. The third category relating to the method of manufacture of TCEs such as crafts, musical instruments and textiles refers more to what is treated as “traditional knowledge” *stricto sensu* (TK) in the Committee’s work. This subject is addressed in a coordinated and complementary manner in document WIPO/GRTKF/IC/13/5.

The meaning of “protection”

General features of intellectual property protection

15. The word “protection” in the above decision of the IGC is understood to mean protection in an IP sense (sometimes referred to as “legal protection”), i.e., protection of human intellectual creativity and innovation against unauthorized use.

16. IP systems are diverse in nature and in terms of the policy goals they seek to achieve. Copyright, for example, is the right of an author to control the reproduction of his or her intellectual creations. Copyright does not, however, provide perfect control as it is subject to various exceptions and limitations designed to balance the needs to protect creativity and disseminate information. The protection of trademarks and geographical indications, on the other hand, is aimed at the protection of the goodwill and reputation of traders and their products and to prevent the unauthorized use of such signs which is likely to mislead consumers.

17. IP protection may comprise property rights. Where property rights do exist, such as economic rights under copyright, they enable the rights holder either positively to exercise the rights himself, to authorize others to do so (i.e., the right can be licensed), and/or to prevent others from doing so.

18. IP protection does not necessarily comprise the grant of property rights – for example, moral rights under copyright provide control over how a work is used, rather than whether or not it may be used, in some cases even after the expiry of the economic rights. Compulsory (non-voluntary) licenses in copyright similarly allow regulation of how a work is used and for the payment of an “equitable remuneration” or a “reasonable royalty” (see, for example, Articles 11*bis* (2) and 13.1 of the Berne Convention, 1971).

Forms of IP protection most relevant to TCEs

19. As many TCEs are literary and artistic works and performances, copyright and related rights are the IP systems of most relevance to TCEs. Previous documents set out the basic

principles of copyright and related rights and applied them to TCEs.⁹ Traditional designs are potentially protectable as industrial designs. In so far as names, signs and symbols are concerned, IP systems which protect marks and indications, as well as laws relating to unfair competition, are the most relevant.

Relevant international IP conventions and treaties

20. There is no international law of IP as such. For example, the international copyright and related rights conventions and treaties administered by WIPO provide an international framework of principles and standards which ratifying States implement in national laws. The international conventions and treaties provide for flexibility on a range of issues and, therefore, national legislation can differ widely from one jurisdiction to another. In practice, therefore, IP protection is a matter for domestic law.

21. The main international IP conventions and treaties that will be referred to in this analysis are:

- a) the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”);
- b) the Paris Convention for the Protection of Industrial Property, 1967 (the “Paris Convention, 1967”);
- c) the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the “Berne Convention, 1971”);
- d) the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (the “Phonograms Convention”);
- e) the TRIPS Agreement, 1994;
- f) the WIPO Copyright Treaty, 1996 (the “WCT, 1996”); and,
- g) the WIPO Performances and Phonograms Treaty, 1996 (the “WPPT, 1996”).

“Protection” and not “safeguarding”, “preservation” or “promotion”

22. IP “protection” in this sense is distinguishable from the “safeguarding” or “preservation” of cultural heritage, which refer generally to the identification, documentation, transmission, revitalization and promotion of tangible or intangible cultural heritage in order to ensure its maintenance or viability. While instruments and programs for the preservation and promotion of TCEs as such are valuable and complement the protection of TCEs, the preservation and promotion of TCEs as such are not the focus of the IGC’s work and, therefore, not of this analysis. Non-IP laws and programs dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with IP protection.

Objectives in relation to the protection of TCEs

23. Previous documents have cited a variety of objectives which States and communities have identified in relation to TCEs,¹⁰ and the TCE Draft Provisions contain a set of draft

⁹ WIPO/GRTKF/IC/6/3.

¹⁰ WIPO/GRTKF/IC/6/3.

objectives. As has been pointed out, some of these are general objectives while others are more directly related to IP and the protection of TCEs. Furthermore, international texts such as the United Nations Declaration on the Rights of Indigenous Peoples constitute a point of reference for determining the needs and aspirations of indigenous peoples.

24. To provide this analysis with an appropriately specific focus, and in line with the IGC's remit and mandate, it is proposed that the immediate focus of this analysis be on those objectives that are specifically related to the IP protection of TCEs.

25. IGC participants have cited various economic and non-economic objectives in relation to IP and TCEs, such as:

- (i) IP protection to support economic development: some communities wish to claim and exercise IP in their TCEs to enable them to exploit them commercially as a contribution to their economic development;
- (ii) IP protection to prevent unwanted use by others: some communities may wish to exercise IP rights in TCEs in order to prevent the use and commercialization of their TCEs by others, including culturally offensive or demeaning use; and,
- (iii) protection against IP: communities are also concerned to prevent others from gaining or maintaining IP over TCEs and derivations and adaptations of them. This entails the use of defensive mechanisms to block or pre-empt third parties' IP rights that are considered prejudicial to the community's interests.

Specific forms of protection desired for TCEs

26. The ways in which different forms of TCEs are exploited around the world are varied. Previous Committee documents set out examples of the kinds of appropriations of cultural expressions that indigenous communities draw attention to.¹¹

27. These actual examples suggest that such communities and other stakeholders call for:

- a) protection of TCEs against unauthorized use, such as reproduction, adaptation, distribution, performance and other such acts, especially commercial use;
- b) prevention of insulting, derogatory and/or culturally and spiritually offensive uses of TCEs;
- c) prevention of the appropriation of the reputation or distinctive character of TCEs in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their "style;"
- d) prevention of the failure to acknowledge source when TCEs are used;
- e) defensive protection of TCEs (meaning, the protection of TCEs against the obtaining of IP rights over the TCEs or adaptations thereof); and,
- f) unauthorized disclosure of confidential or secret TCEs.

¹¹ WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

28. To clarify options and to give this analysis a practical and applied focus, it is proposed to base this analysis on these six main forms of protection as identified and discussed in previous documents.

29. In respect of defensive protection of TCEs, it is proposed to focus specifically on calls for the protection against (i) the exercise of copyright in works derived from TCEs, and (ii) the acquisition of trade mark protection in respect of indigenous and traditional names, words and symbols. The possible use of patent classification tools to facilitate the searching of patent documents covering TCEs that are relevant to claimed inventions was discussed in WIPO/GRTKF/IC/6/3 Add. 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.

The meaning of “gaps”

30. The decision of the IGC at its previous session requires an analysis of “gaps” in relation to “obligations, provisions and possibilities which already exist at the international level to provide protection for TCEs/EoFs.”

31. The use of the notion “gap” in the IGC’s decision implies an unmet economic, cultural or social need. Identifying such economic, cultural or social needs and assessing whether or not they are “unmet” is an uncertain exercise as there is not yet agreement within the IGC on these issues. Identifying an unmet need as a “gap” and, above all, determining whether or not it should be filled, is a matter for decision by Member States.

32. Proceeding pragmatically, however, in order to respond to the IGC’s decision, identifying gaps could be undertaken with reference to:

- (i) the forms of protection desired by States and communities (referred to above); and/or
- (ii) specific technical perceived shortcomings of the existing IP system in relation to TCEs. Previous completed questionnaires and in other documents and materials prepared for the IGC have cited and discussed these at length.¹²

33. The desired forms of protection have been identified above. The following have been suggested as specific, technical limitations of the IP systems most relevant to TCEs:

- (a) *The “originality” requirement:* copyright protects only “original” works, and many traditional literary and artistic productions are not “original”. Similarly, traditional designs are not “new” or “original” for industrial designs protection. On the other hand, adaptations of TCEs can be protected as “original” copyright work and designs, leading to calls for “defensive protection” (see further below);
- (b) *Ownership:* copyright and industrial designs protection requires the identification of a known individual creator or creators. It is difficult, if

¹² For example: WIPO/GRTKF/IC/1/5; WIPO/GRTKF/IC/3/11.; WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/6/3.

not impossible, to identify the creators of TCEs because TCEs are communally created and held and/or because the creators are simply unknown and/or unlocatable;

- (c) *Fixation*: the fixation requirement in many national copyright laws prevents intangible and oral expressions of culture, such as tales, dances or songs, from being protected unless and until they are fixed in some form or media. Even certain “fixed” expressions may not meet the fixation requirement, such as face painting, body painting and sand carvings. Yet, on the other hand, rights in recordings and documentation of TCEs vests in the person responsible for these acts of fixation, such as ethnomusicologists, folklorists and other researchers and not in the TCE bearers;
- (d) *Term of protection*: the limited term of protection in copyright, related rights and industrial designs protection is claimed to be inappropriate for TCEs. First, it fails to meet the need to protect TCEs in perpetuity. And, the limited term of protection requires certainty as to the date of a work’s creation or first publication, which is often unknown in the case of TCEs;
- (e) *Formalities*: while there are no formalities in copyright and related rights, there are registration and renewal requirements attached to industrial designs and trade marks protection. Such requirements have been suggested to be obstacles to the use of these IP systems by indigenous and traditional communities;
- (f) *Exceptions and limitations*: aside from the limited term of protection for most forms of IP (which is in itself a limitation), it has been argued that other exceptions and limitations typically found in IP laws are not suitable for TCEs. For example, typical copyright exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission might disturb indigenous sensibilities and undermine customary rights under customary laws and protocols. Similarly, national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. These exceptions and limitations have been criticized by indigenous and traditional communities;
- (g) *Defensive protection*: Indigenous peoples and communities are concerned with non-Indigenous companies and persons imitating or copying their TCEs or using them as a source of inspiration, and acquiring IP protection over their derivative work, mark or other production. For example, communities have expressed concerns over the use by external parties of words, names, designs, symbols, and other distinctive signs in the course of trade, and registering them as trademarks. Furthermore, neither copyright nor industrial designs laws protect the “style” of literary and artistic works and designs, respectively.

Gaps not directly addressed

34. *Conceptual divide*: The suggested focus on these specific and technical perceived shortcomings in existing IP systems is not intended to distract from more profound conceptual divergences between the aspirations and perspectives of indigenous peoples and the

conventional IP system. Indigenous participants in the Committee and elsewhere have clearly expressed their doubts that the conventional IP system can meet their fundamental needs. For example, it has been stated that the very conception of “ownership” in the conventional IP system is incompatible with notions of responsibility and custodianship under customary laws and systems. While copyright confers exclusive, private property rights in individuals, Indigenous authors are subject to complex rules, regulations and responsibilities, more akin to usage or management rights, which are communal in nature.¹³

35. This analysis cannot fully address let alone offer solutions for these more fundamental differences. The copyright system is intended, in essence, to permit the commercial exploitation of creative works in as fair and balanced a manner as possible. On the other hand, many TCEs are created primarily for spiritual and religious purposes and not to reach as broad a public as possible. As has been discussed previously in the Committee,¹⁴ Indigenous communities’ needs with respect to their TCEs that cannot be met within an IP framework (even if adapted to respond to the more technical shortcomings) could perhaps be met through use of other non-IP mechanisms, such as laws relating to blasphemy, cultural rights, dignity, cultural heritage preservation, defamation, rights of publicity, and privacy.

36. *Operational divide:* Second, the fact-finding work undertaken by WIPO at the outset of this program of work in 1998 and 1999¹⁵ highlighted that obstacles to the effective use of IP tools by indigenous and local communities include, perhaps most importantly, practical and operational obstacles, such as lack of access to appropriate legal advice and the financial means to acquire and enforce rights. Janke in her studies for WIPO testifies to these operational obstacles, for example, in her chapter on “Use of Trade Marks to Protect Traditional Cultural Expressions”. Numerous suggestions have been made to address these obstacles, including the use of alternative dispute resolution (ADR).¹⁶ These operational obstacles are not the focus of this analysis.

37. *Shared TCEs:* Third, a significant and recurring problem with regard to the protection of TCEs is locating ownership of TCEs that are shared by more than one community either in the same national territory or in different territories. Options for addressing this issue include co-ownership of rights and allowing communities separately to apply for (if some form of application is necessary) and hold rights in the same or similar TCEs. A further possible solution to this issue is to vest the rights in the State or statutory body. Existing regional organizations and mechanisms may also be important stakeholders in resolving the “regional folklore” question.

38. *Gaps inherent in IP systems:* Finally, there is an attempt to highlight both (i) gaps specific to TCEs and (ii) gaps in the protection available to TCEs that are inherent to the IP system and not specific to TCEs (such as the limitations and exceptions under copyright). The IP system is not a system of absolute control over the protected subject matter and especially the copyright and related rights systems are subject to a wide range of exceptions

¹³ See WIPO/GRTKF/IC/3/11, page 3; McDonald, p. 45.

¹⁴ WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

¹⁵ WIPO, Fact-finding Mission Report; WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/5/3.

¹⁶ WIPO, Fact-finding Mission Report; WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/3/15.

and limitations. While the focus of this analysis may be on gaps that arise due to the specific qualities and characteristics of TCEs, other more general gaps are also identified.

Summary

39. The table below summarizes the structure of this analysis as suggested above. This methodical approach has been adopted to facilitate the preparation and reading of this analysis. However, in practice, the issues rarely arise in such a “neat” way. Furthermore, TCEs are often closely bound up with forms of TK (see WIPO/GRTKF/IC/13/5). The approach taken is, therefore, somewhat artificial when measured against what may happen in practice. However, as stated, it is suggested that a more or less methodical and structured approach may facilitate the discussions of the IGC and may make it easier for decisions to be taken by it.

TCE subject matter:	Desired protection:	Perceived shortcomings:
(i) literary and artistic productions such as traditional music and visual art (ii) performances of TCEs (iii) designs (iv) secret TCEs (v) indigenous and traditional names, words and symbols	(i) protection of TCEs against unauthorized use (ii) prevention of insulting, derogatory and/or culturally and spiritually offensive uses of TCEs (iii) prevention of false and misleading claims to authenticity and origin (iv) the failure to acknowledge source when TCEs are used (v) defensive protection of TCEs (vi) unauthorized disclosure of confidential or secret TCEs	(i) the originality requirement (ii) ownership (iii) fixation (iv) term (vi) formalities (vii) exceptions and limitations (vii) defensive protection

III. THE ANALYSIS

A. Obligations, provisions and possibilities that already exist at the international level to provide protection for TCEs/EoFs

Literary and artistic productions

40. Literary and artistic productions are typically protected by copyright law, embodied, at international level, in the Berne Convention, 1971, the TRIPS Agreement, 1994 and the WCT, 1996. Therefore, in respect of *traditional* literary and artistic productions, reference is made to these international instruments.

41. Under these instruments, the following obligations, provisions and possibilities exist to protect literary and artistic TCEs:

- a) Traditional literary and artistic productions which are sufficiently “original” and of which the author or authors are known, may be protected as copyright works. “Originality” is not defined in the relevant international treaties, nor is it generally defined in national laws. It is a matter left for determination by the courts in relation to particular cases. It may be said in general, however, that a work is “original” if there is some degree of intellectual effort involved and it has not been copied from someone else’s work.¹⁷ In general, a relatively low level of creativity is required in order to meet the originality requirement in copyright law. Case law from various jurisdictions, such as Australia,¹⁸ China¹⁹ and elsewhere,²⁰ has confirmed that contemporary expressions of traditional cultures, being adaptations and interpretations inspired by or based upon pre-existing traditional literary and artistic productions, may be protected as copyright works. The protection discussed here is available for a contemporary literary and artistic production that incorporates new elements and in respect of which there is generally a living and identifiable author (or authors).²¹
- b) Works which have not yet been “published” and which are of “unknown authors” who are assumed to be nationals of a country of the Berne Union are protected as copyright works, under Article 15.4 of the Berne Convention, 1971. This Article was introduced into the Berne Convention in 1967 specifically to provide protection to TCEs. National legislation should designate a “competent authority” to represent the author in such cases, and other countries may be notified as to the authority through a written declaration made to the Director General of WIPO. Only one State has so far made such a Declaration, namely India, although some other countries have enacted protection based on Article 15.4. Under Article 7.3 of the Berne Convention, once the work is “lawfully

¹⁷ Palethorpe and Verhulst, page 28; see also Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, 1987), pp. 228 to 234.

¹⁸ *M, Payunka, Marika and Others v. Indofurn Pty Ltd* 30 IPR 209; *Bulun Bulun v R & T Textiles Pty Ltd* (198) 41 IPR 513.

¹⁹ Decision of Beijing Higher People’s Court, Case No. 246, 17 December 2003.

²⁰ Lucas-Schloetter, *op. cit.*, cases cited in footnote 238 and on pages 301 to 304.

²¹ WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

made available to the public”, the period of protection will expire after 50 years. On the other hand, the 50 year term in the Convention is only a minimum term and Member States could in their national laws provide for a longer term (Article 7.6). A country could therefore, in theory, provide for a hundred year or even a thousand year term for works under Article 15.4. However, in international situations, the “comparison of terms” provision in Article 7.7 of the Convention would apply. This means that (i) the duration of protection is governed by the term in the country where protection is claimed, and (ii) however, if the term in that country is longer than the term in the country of origin of the protected work, then the shorter of the terms would apply. In practice, this means that a term longer than the minimum will only apply when both countries have provided for that longer term – if not, the shorter of the terms will apply. Article 20 of the Convention allows parties to enter into special agreements amongst themselves.

c) Collections, compilations and databases of TCEs, whether pre-existing or contemporary, are protected as copyright works as such. The TRIPS Agreement and the WCT are clear that compilations of non-copyright materials can be protected as compilations and databases. In addition, in some jurisdictions, there is special *sui generis* protection for databases. See also under “Registers and databases” below.

d) Recordings of TCEs such as music are protected under “related rights” law.

42. For all these works protected as copyright ((a) to (c) above):

- a) The copyright owners would have economic rights enabling them to authorize or prevent the range of acts associated with copyright protection, including reproduction, adaptation, public performance, distribution and communication to the public.
- b) They would also enjoy moral rights to attribution, integrity (the right to object to distortion of the work) and publication (the right to decide when, where and in what for the work will be published or disclosed).
- c) Economic rights would last for at least 50 years following the death of the author or last surviving author in cases of joint authorship. The precise duration of protection will depend on national law. Moral rights, on the other hand, might last indefinitely, again depending on national law.
- d) “Fixation” is not a requirement for protection under international copyright law (therefore, “unfixed” paintings and other visual art such as body-painting and sand carvings are in principle protectable under international principles). The “fixation” obstacle is only relevant in those (primarily common law) countries which have chosen to require fixation as a requirement at the national level. In addition, most TCEs which are vulnerable to exploitation are in fixed form (such as visual art, crafts), an exception perhaps being live performances of TCEs (for which see below under “Performances of TCEs”).

- e) Copyright protection is available for works made by more than one author, provided the authors are identifiable or in cases where a legal entity is the copyright owner of works.
- f) There are no formalities attached to copyright protection.
- g) The protection is internationally enforceable through the Berne Convention, 1971 and the TRIPS Agreement, 1994. As a result, TCEs protectable as copyright works are protected in foreign countries parties to these instruments on the basis of “national treatment.”

43. For recordings of TCEs protected as related rights ((d) above):

- a) The protection granted to sound recordings of traditional music (and other TCEs such as legends and proverbs) derives from the Rome Convention, 1961, the TRIPS Agreement, 1994 and the WPPT, 1996 addressing “related rights”. The protection vesting in a sound recording provides an indirect protection for the TCEs, and also promotes the preservation and promotion of the TCEs. TCEs which were once only transmitted by oral tradition, and therefore unprotected under those national laws that require fixation as a copyright requirement, may be indirectly protected through their fixation in a sound recording. The owners of rights in sound recordings are in effect the producers of the sound recordings, and they enjoy the exclusive rights of reproduction, distribution, rental and making available. They may also enjoy, under Article 12 of the Rome Convention and Article 15 of the WPPT, 1996, an optional right of remuneration in the case of sound recordings published for commercial purposes for broadcasting or communication to the public. This equitable remuneration would be shared with the performers whose performances are recorded (see further below under “Performances of TCEs”). According to an Agreed Statement concerning Article 15 of the WPPT, 1996, producers of sound recordings of TCEs not published for commercial gain may also, under national implementing laws, be granted such a right (as may the performers of the TCEs embodied in the recording, see further below). This Agreed Statement was adopted specifically to take into account that TCEs are often exploited on a large scale by broadcasting and other forms of communication to the public on the basis of non-commercial recordings (such as ethnographic recordings).

Performances of TCEs

44. Although there was a view that even performers of TCEs were protected under the Rome Convention, 1961, any doubt was removed by the WPPT, 1996, which now clearly protects also the rights of performers of “expressions of folklore”. The protection provided by the WPPT, 1996 encompasses moral rights, various exclusive economic rights and the optional right of equitable remuneration in cases where the performance is recorded in a sound recording that is published for commercial purposes, as referred to above. The Agreed Statement concerning Article 15 of the WPPT, 1996 also applies to performers.

45. Performers’ rights are time limited to at least 50 years from the time that the performance was fixed in a sound recording. If the performance is not fixed (such as a live

performance), term is not relevant because protection can only be in respect of simultaneous acts.²²

46. It might be said that performances of TCEs are extensively protected under international related rights laws or at least on par with other performances; the actual extent of this protection at the national level depends on the extent to which and how countries have ratified and implemented the WPPT, 1996.²³

Designs

47. Much of the analysis above with respect to literary and artistic productions is relevant also to designs. Traditional designs that are more contemporary adaptations of earlier traditional designs would qualify for protection as industrial designs and could be registered as such, and other documents cited examples from China and Kazakhstan.²⁴ On the other hand, truly old, underlying designs and copies of them would not be protected. There is, however, less experience with the protection of traditional designs.

Secret TCEs

48. The best form of protection for secret TCEs is not to disclose them, but case law demonstrates that under common law in at least some jurisdictions information conveyed in confidence is protected against further disclosure. In the Australian case *Foster vs. Mountford* (1976) 29 FLR 233 an anthropologist was interdicted from continuing to distribute for sale a book which depicted and contained information about sacred sites, objects and other TCEs which were of deep religious and cultural significance to an indigenous community in Australia. The community had disclosed this information to the anthropologist in good faith and in confidence.²⁵

49. This form of protection under common law finds resonance in the specific protection provided in international IP treaties laws against unfair competition (Article 10bis of the Paris Convention, 1967 and Article 39 of the TRIPS Agreement), which includes protection against the disclosure of confidential information. A “breach of confidence”, such as the one in the *Foster vs. Mountford* case, is included as a form of a practice “contrary to honest commercial practices”²⁶.

50. Protection of confidential information requires neither formalities nor a contractual relationship between the community and the party receiving the information.

²² Articles 5 and 6, WPPT, 1996.

²³ See WIPO, “Survey on Implementation of Provisions of the WCT and the WPPT”, 2003, available at http://www.wipo.int/edocs/mdocs/copyright/en/scr_9/scr_9_6.pdf and Lucas-Schloetter, *op. cit.*, pages 304 and 305.

²⁴ WIPO/GRTKF/IC/5/3 and WIPO, Consolidated Analysis.

²⁵ WIPO, Consolidated Analysis.

²⁶ Note 10 to the TRIPS Agreement.

Indigenous and traditional names, words and symbols

51. There are two aspects here, namely:

- a) *Defensive protection*: Indigenous communities are concerned with non-Indigenous companies and persons using their words, names, designs, symbols, and other distinctive signs in the course of trade, and registering them as trademarks, geographical indications, and/or domain names; and,
- b) *Positive protection*: the positive protection by communities of indigenous names, words and symbols as trade marks and geographical indications.

52. In this respect of defensive protection, Article 6 *quinquies* of the Paris Convention provides for the refusal or invalidity of the registration of marks that are “contrary to morality or public order and, in particular, of such a nature as to deceive the public”. Corresponding rules can be found in the national trade mark laws of most countries.

53. The general law of unfair competition, including protection against “passing off”, is also applicable and useful in this context.

54. In respect of positive protection, international principles and procedures are available to communities who wish to register trademarks which are “distinctive”. Trademark protection is potentially indefinite. Several indigenous communities have registered collective or certification trade marks (see further below).

B. Gaps which exist at the international level, and an illustration of those gaps with examples to the extent possible

Literary and artistic productions

55. The following gaps may be identified:²⁷

- a) *The “originality” requirement*: TCEs which are mere imitations or recreations of pre-existing TCEs are unlikely to meet the “originality” requirement and, therefore, to be protected as conventional copyright works. This means that they are unlikely to be vested with economic rights (it should be noted that moral rights can also apply to works in the “public domain”, including perhaps pre-existing TCEs). Further, in respect of those TCEs which are protected as conventional copyright works, the law makes no distinction based on the identity of the author, i.e., - the originality requirement could be met even by an author of a contemporary expression of folklore who is not a member of the relevant cultural community in which the tradition originated. This may trouble indigenous and traditional communities who may wish to deny or at least restrict the ability of persons not from the relevant cultural community from enjoying copyright in creations derived from that cultural community (see under “Defensive protection” below).

²⁷ The fixation requirement is not addressed here as a “gap” because it is not a requirement under international copyright law.

- b) *Protection of “style”*: One of the claims most frequently heard is that the “style” of an indigenous production has been imitated or misappropriated. Copyright and designs laws permit the imitation of the non-original elements or underlying ideas and concepts of works, which is a widespread practice as creativity is nourished and inspired by other works. Therefore, even if copyright were to vest in a new tradition-based cultural expression, copyright protection would not *per se* prevent the traditional “style” of the protected work from being appropriated. Elements of style may of course be protected to the extent that a style incorporates original expression. Further, the law of unfair competition and the common-law tort of passing off might be helpful (see below). These may relate to protection of a style *per se*, as an object of protection, or to protection against a misleading connotation or representation that is based on the use of a style or distinctive imagery or symbols. It is in fact often the reputation associated with a TCE, as embodied or represented by its distinctive “style”, that is the object of misappropriation.
- c) *Ownership*: In cases of underlying and pre-existing TCEs, no protection may be available under copyright for productions in respect of which there is no identifiable author or authors but rather a community or other collective which seeks protection. In other words, productions which have been collectively developed over time by unknown authors are not protected by copyright. There is one possibility, however, and that is the protection afforded by Article 15.4 of the Berne Convention, discussed above.²⁸ Disadvantages of this Article include that it is optional and most national laws have not enacted it, the term of protection for such works is limited to at least 50 years once the work is “lawfully made available to the public” and that the role of communities is not explicitly mentioned but rather a “competent authority” exercises the rights on behalf of the author.
- d) *Term of protection*: The duration of copyright protection generally extends to 50 years after the death of the author, or 70 years in some jurisdictions. The Berne Convention, 1971 stipulates 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods. However, it is generally seen as integral to the copyright system that the term of protection not be indefinite; the system is based on the notion that the term of protection be limited, so that works ultimately enter the public domain. That said, moral rights are often indefinite in many national laws.
- e) *Exceptions and limitations*: the “public domain” element of the IP system is criticized and/or disputed by some indigenous communities as a concept not recognized by them. Furthermore, certain specific exceptions and limitations common in copyright law are criticized as inappropriate to TCEs, such as exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission.²⁹ Similarly, national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. Indigenous communities have expressed concerns about these kinds of exceptions and limitations.

²⁸ Other possibilities often discussed for addressing the ownership question are the protection afforded to anonymous works and joint and/or collective works under copyright. However, as these options are generally seen as inadequate, they are not discussed further. See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

²⁹ McDonald, I. *op cit.*, p. 44.

The limited term of copyright and related rights protection has already been dealt with separately.

- f) *Defensive protection*: the question here is whether and how there should be regulation of derivative works created by authors not connected with the traditions and cultural materials they adapted or were inspired by. This discussion can also be applied to traditional designs. As extensively discussed previously,³⁰ works derived from materials in the public domain can be copyright protected, because a new interpretation, arrangement, adaptation or collection of public domain materials, or even their “re-packaging” in the form of digital enhancement, colorization and the like, can result in a new distinct expression which is sufficiently “original.” The originality requirement could be met even by an author who is not a member of the indigenous and traditional community in which the tradition originated. In this context, indigenous and traditional communities may seek a form of defensive protection to deny or at least restrict the ability of authors not from the relevant community from enjoying copyright in creations derived from the cultural traditions of that community.
- g) *Ownership of recordings and documentation*: In so far as recordings and documentation of TCEs are concerned, including traditional performances, a disadvantage is that the protection described above vests in the producer who need not and is often not a member of the community concerned. The producer will often be an ethnomusicologist, folklorist or other collector. Indigenous peoples and local communities sometimes argue that their IP-related rights and interests, including those under customary and indigenous laws, are not always adequately taken into account when their TCEs are first recorded and documented by folklorists and other fieldworkers or when they are subsequently displayed and made available to the public by museums, archives and other collections. The activities of folklorists, collectors, fieldworkers, museums, archives etc., are, however, extremely important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Cultural institutions also play a valuable educational role. This question demonstrates in a practical way tensions that can arise between “preservation” and “protection”, as discussed earlier, because the very process of preservation can trigger concerns about lack of protection and can run the risk of unintentionally making TCEs in the “public domain” vulnerable to unwanted exploitation.

56. Examples:

- a) paintings, including rock art, made by Indigenous persons have been reproduced by non-Indigenous persons on carpets, printed clothing fabric, T-shirts, dresses and other garments, and greeting cards, and subsequently distributed and offered for sale by them. Traditional art has also been offered online as wall paper. Indigenous tattoos have also been reproduced and used outside of the traditional context;
- b) traditional music has been sampled and fused digitally with ‘techno-house’ dance rhythms to produce a best-selling “world music” album protected by copyright;

³⁰ See especially WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

- c) to service the souvenir market, arts and crafts (such as woven baskets, small paintings and carved figures) employing generic traditional art styles have been reproduced, imitated, and mass-produced on such non-traditional items as t-shirts, tea-towels, place mats, playing cards, postcards, drink coasters and coolers, calendars and computer mouse pads;
- d) a sculpture incorporates a sacred traditional symbol. The sculptor claims copyright in the sculpture but the community charges that he used their symbol without consent;
- e) ethnographic recordings containing sensitive material depicting initiation rites have been made available by a cultural institution for educational and commercial purposes. The community is not the owner of the rights in the recordings and cannot object.

Performances of TCEs

57. As noted above, performances of TCEs are extensively protected under international related rights laws, namely under the WPPT, 1996. However, the following could be identified as shortcomings in this form of protection:

- a) the protection is for the benefit of the performer(s) of the TCE, and not the relevant community, especially in cases where the performer is not a member of that community. Where the performer(s) is from the same community then it is more likely that that the community will benefit directly from this protection;
- b) only aural performances, or the aural aspect of an audiovisual performance, are protected under the WPPT, 1996. This applies to all performances, not merely performances of TCEs. The possible extension of the WPPT to audiovisual performances has been under discussion by WIPO's Member States since the WPPT was adopted in 1996;
- c) performers' rights are limited in the audiovisual sector (again, generally, not merely in respect of TCEs). Under Article 19 of the Rome Convention, 1961, once a performer has consented to the inclusion of his performance in a visual or audiovisual fixation, the rights in Article 7 of the Convention "shall have no further application". This means that aside from the fixation right, performers' rights are limited in the audiovisual sector;
- d) performers' rights are time limited to, at least, 50 years in cases where the performance is fixed in a sound recording. Term is not relevant to unfixed performances. The question of term of protection may, therefore, not be considered a "gap" as such.

58. Examples: Photographs of live performances of songs and dances by Indigenous persons have been taken, and they have been subsequently reproduced and published on CDs, tape cassettes, postcards and on the Internet.

Designs

59. As with literary and artistic productions, truly old designs are not protected as they are not “new” or “original”. Furthermore, the term of protection for designs is shorter than for copyright works. Designs protection depends also upon the compliance with certain formalities.

60. Examples: Designs embodied in hand-woven or hand-made textiles, carpets, weavings and garments have been copied and commercialized by non-Indigenous persons.

Secret TCEs

61. While as noted Article 39 of the TRIPS Agreement and Article 10*bis* of the Paris Convention could in some instances provide adequate protection for secret TCEs, these provisions are perhaps mainly applicable to industrial and commercial information. However, not all secret TCEs constitute commercially valuable information. The disclosure of TCEs, as the *Mountford* case referred to above shows, often rather cause cultural and spiritual rather than economic harm. This might therefore be considered a gap in the protection provided to confidential information.

62. Furthermore, it is not certain that all secret TCEs would be regarded as “confidential” for this purpose. Many TCEs have been disclosed within the community, which might include many people living in vast areas and in more than one environment, such as rural and urban environments. In other words, it may sometimes not be clear in which circles the secret TCEs could be revealed without losing their confidential status.

63. Example: confidential information disclosed to an anthropologist has been published by the anthropologist (see *Mountford* case above). In certain cases, museums, archives and other such institutions have inadvertently disclosed confidential information.

Indigenous and traditional names, words and symbols

64. As already noted, there is in international trade mark law the possibility to refuse registration, or declare invalid the registration, of marks that are “contrary to morality or public order and, in particular, of such a nature as to deceive the public”.

65. Although this protection seems generally adequate, a “gap” may exist in that the concepts of “contrary to morality” and “contrary to public order” are broad concepts requiring value judgments to be made by trade mark office staff, many of whom may not have any particular experience with indigenous communities and TCEs. Similarly, protection against “deceptive” use requires a value judgment to be made and it is often the perceptions of the general public that are taken into account.

66. For these reasons, some countries and regional organizations have enacted special measures to protect against the use of TCEs as trademarks. See under “Options which exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level” below.

67. Example: The commercial use of Indigenous words, names and symbols by non-indigenous entities in respect of corporate logos, sports gear, fashion, sports teams, games and toys, motor cars, weapons, and alcoholic products.

C. Considerations relevant to determining whether those gaps need to be addressed

68. Decisions as to whether or not to address any of the gaps identified above are for participants in the Committee to make. This section sets out some of the consideration and factors that participants may wish to take into account in making such decisions.

Whether to address gaps at the international, regional, national and/or local levels

69. One consideration could be the level at which a gap could be or may need to be addressed. Certain gaps may require addressing at the international level, by way of an international instrument of some kind,³¹ for example, while others could be addressed at the regional, national and/or local levels. This document does not address the range of options available in terms of the kinds of instruments that States may wish to adopt, which are fully discussed in WIPO/GRTKF/IC/12/6.

Legislative, practice, capacity-building

70. Gaps could be addressed through legislative action (such as the enactment of new legal standards or the improvement of existing standards, whether at the international, regional or national levels), the development of practical tools (such as the provision of model compensation/benefit-sharing contracts or research protocols) and/or through capacity-building (such as strengthening the ability of communities to negotiate with third parties on or more equal footing).

The legal and policy environment

71. A consideration could be the degree to which the protection of TCE subject matter is under discussion in other forums or to which extent TCEs are already the object of protection under legal instruments in other policy areas. For example, two UNESCO Conventions address TCE subject matter, the Convention for the Safeguarding of Intangible Cultural Heritage, 2003 and the Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005, discussed in previous documents. The protection of TCEs is also under discussion in certain human rights and indigenous issues forums, and the United Nations Declaration on the Rights of Indigenous Peoples³² addresses the protection of TCEs. A factor could be how best these various policy processes can complement and support each other.

72. The policy environment within WIPO is also directly relevant. One of the elements of the WIPO Development Agenda is, for example: “To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.”

³¹ See WIPO/GRTKF/IC/12/6 for a range of options an international instrument could take.

³² Made available to the Committee as document WIPO/GRTKF/IC/12/INF/6.

Policy questions

73. Committee participants may also wish to consider why the gaps identified arise in the first place and the policy implications of addressing them.

74. The possible protection of TCEs raises a number of complex cultural, economic, social and trade-related questions. Previous documents have discussed policy questions at some length.³³

75. In relation to IP policy, the protection or otherwise of TCEs could be assessed in relation to the effects such protection would have on the promotion and protection of creativity and innovation as contributions to sustainable economic development, including local and rural community development. Calls for the indefinite protection of TCEs or for the protection of “style”, for example, are usefully assessed in relation to the core policy tenets of the relevant IP systems. Furthermore, an integral part of developing an appropriate policy framework within which to view IP protection and TCEs is a clearer understanding of the role, contours and boundaries of the so-called “public domain” and the implications for the “public domain” of protecting TCEs.³⁴ A key policy challenge is coordinating any new protection for TCEs with existing IP systems.

76. However, the protection of TCEs also touches upon other important policy areas. Participants in the Committee may wish to consider the protection of TCEs in relation to, for example: the safeguarding and preservation of cultural heritage; freedom of expression; respect for the rights, interests and claims of indigenous and other traditional communities; recognition of customary laws, protocols and practices; access to knowledge and the scope of the “public domain”; addressing the challenges of multiculturalism; and, promoting cultural diversity, including linguistic diversity, and access to a diversity of cultural expressions.

Economic, cultural and social objectives

77. Identifying policy responses to these issues recalls the need to be clear on the broader economic, cultural and social objectives intended to be served by the protection of TCEs, as discussed above. Previous documents have identified a range of objectives sought to be achieved through TCE protection, such as:

- (i) Recognizing the value of TCEs
- (ii) Promoting respect for TCEs
- (iii) Meeting the actual needs of communities
- (iv) Preventing the misappropriation of TCEs
- (v) Empowering communities
- (vi) Supporting customary practices and community cooperation
- (vii) Contributing to the safeguarding of traditional cultures
- (viii) Encouraging community innovation and creativity
- (ix) Promoting intellectual and artistic freedom, research and cultural exchange on equitable terms

³³ WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/3.

³⁴ See WIPO document WIPO/GRTKF/IC/5/3, paras. 22 to 33, and subsequent documents.

- (x) Contributing to cultural diversity
- (xi) Promoting community development and legitimate trading activities
- (xii) Precluding unauthorized IP rights
- (xiii) Enhancing certainty, transparency and mutual confidence.

Specific technical and legal questions

78. Committee participants may also wish to assess the addressing of gaps in relation to the specific technical and legal questions that have been previously identified as necessary to consider if wishing to establish new forms of protection for TCEs. These are:

- (a) what form of protection is intended and what rights should be granted?
- (b) who would own the rights and who would benefit from them?
- (c) what are the exceptions and limitations, if any, that should attach to these rights?
- (d) how would the rights acquired? Should there be formalities?
- (e) for how long should the rights last and how are they lost? Should they operate retroactively?
- (f) how to administer and enforce the rights? What forms of legal proceedings and dispute resolution mechanisms should there be? And.
- (g) how should foreign rights be treated?

Operational questions: rights management and compliance

79. Protection should be practically feasible and enforceable, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike. It has been widely recognized that the protection of TCEs must be supported by the provision of appropriate technical assistance, capacity-strengthening and support for documentation where desired by communities.

D. Options which exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level

80. It is always an option for a States to enact a special, stand-alone law to provide protection for TCEs that addresses the identified gaps under conventional IP law. A number of countries and regional organizations have enacted such laws. In addition, many countries have provided special protection for TCEs within their copyright legislation, and others have provided for IP-like protection for TCE subject matter in other legislation, such as cultural heritage safeguarding and trade practices legislation. The texts of these laws are available on WIPO's website,³⁵ and many of them have been analyzed and compared in previous Committee documents.³⁶ Such laws and measures can deal comprehensively with the gaps identified and provide an entire form of protection directly tailored for TCEs. They provide, for example, for communal rights which are protected indefinitely. Whether to enact such a law is a political and policy decision for Member States, taking into account policy, operational and technical considerations such as those suggested above.

³⁵ <http://www.wipo.int/tk/en/laws/folklore.html>

³⁶ WIPO/GRTKF/IC5/INF 3, WIPO/GRTKF/IC/5/3 and WIPO, Consolidated Analysis.

81. Taking this general option into account, the focus of this section is particularly on specific adjustments and improvements to relevant existing IP laws as well as non-legal options addressing the specific gaps identified. These adjustments and improvements would be *sui generis* in the sense that they would respond to the particular needs of TCE bearers and be tailored to the particular qualities of TCEs. The options are not necessarily mutually-exclusive.

Literary and artistic productions

Judicial recognition of communal rights and interests on the basis of equity

82. Courts have been prepared to recognize communal interests in a copyright work. In the Australian case of *Bulun Bulun v. R & T Textiles (Pty) Ltd (1998) 41 IPR 513*³⁷, the court held that, where an individual indigenous artist is given permission by an indigenous community, for the creation of an artistic work in accordance with the requirements of customary law and custom, the artist may owe fiduciary obligations to act to preserve the integrity of communal culture. Such fiduciary obligations may arise out of the relationship between the artist and the community as one of mutual trust and confidence. Customary law is part of the factual matrix which characterizes the relationship. Arising out of the fiduciary relationship, the community's primary right was to bring an action against the artist to enforce his fiduciary obligations in the event of a breach of his obligations.

Communal moral rights

83. Moral rights (the rights to claim authorship and to object to derogatory treatment) may respond to many needs in relation to TCEs and are potentially indefinite in duration (see above). However, they are, like economic rights under copyright, linked to an identifiable author or authors. Communal moral rights could be an avenue to explore further. In 2003, the former Australian Government circulated an exposure draft of an Indigenous Communal Moral Rights Bill to protect the cultural interests of Indigenous communities.³⁸ ICMR was considered to be a possible tool for indigenous peoples to prevent derogatory treatment of works drawing on their traditions, customs and beliefs. Aspects of the proposed draft Bill were criticized by indigenous people and other interests. The present Government has not yet made a decision about ICMR legislation.

84. It is worth recalling that moral rights protection can and often lasts indefinitely in many national laws. In effect, moral rights continue to apply in respect of works that have since passed into the public domain, which could include pre-existing TCEs.

Clarification of scope of Article 15.4 of the Berne Convention

85. Article 15.4 of the Berne Convention has been of very limited use in practice. It might be worth exploring the reasons therefore. It has been suggested in discussions within the

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³⁷ See Janke, Terri, 'Minding Culture – The Protection of Traditional Cultural Expressions', commissioned by WIPO.

³⁸ Intervention of Delegation of Australia (WIPO/GRTKF/IC/5/15, para. 131).

Committee that an option might be to re-examine Article 15.4 of the Berne Convention and to explore options for its improvement.³⁹

86. These options could include clarifying that (i) the protection under the article extends also to “published” works, (ii) the term of protection applicable to Article 15.4 works is a minimum and States are free to apply a longer term if they wish, provided the term is a limited one, and (iii) the “competent authority” referred to could include an authority established under national law by an indigenous or local community or some other authority in which such communities have a strong say.

87. It is generally seen as integral to the balance within the copyright system that the term of protection not be indefinite, so that works ultimately enter the public domain. Yet, there are exceptions. Moral rights are indefinite in many national laws. Royalty rights from use of the famous work ‘Peter Pan’ subsist in perpetuity under United Kingdom copyright law for the benefit of a charitable cause.

Deleted: , 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 descendants

88. No time limit is set in the Model Provisions, the Panama Law and the Pacific Regional Framework. It has been suggested that the claim for indefinite protection might be limited to a ‘forward-looking’ term of protection, rather than retrospective, and that TCEs could be protected for the next 150 years, for example.⁴⁰ It has also been suggested that the maximum term of protection could be linked to the lifespan of the source community. This would entail 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, protection for the TCE would lapse.⁴¹ This latter approach is the one embodied in the TCE Draft Provisions before the Committee.

Domaine public payant

89. Several countries have introduced this system according to which works in the public domain entail a payment, often to a national cultural fund or the like. This approach provides remuneration from the use of TCEs but does not prevent outsiders from using the TCEs.

Orphan works

90. “Orphan” works refer to copyright works of which the author is unlocatable. TCEs are generally seen as productions which never had an author in the copyright sense or where the author is “unknown” and are, therefore, not “orphaned” as such. Further, indigenous communities might be sensitive to suggestions that their TCEs are “orphans”. In the context of TCEs, where there is often no single fixed expression by a single identifiable author, it could be argued, however, that a given TCE resembles an “orphaned” work and that, therefore, laws or current proposals which address unlocatable authors may provide ideas or options for the protection of TCEs.

91. At least one jurisdiction, Canada, has already implemented legislation that creates a compulsory licensing scheme allowing for the use of published works to be issued by the

³⁹ Interventions by Delegations of Italy and Brazil at the 12th session of the IGC.

⁴⁰ See WIPO/GRTKF/IC/5/15, par. 37.

⁴¹ Scafidi, S., ‘Intellectual Property and Cultural Products,’ 81 *B.U.L. Rev.* 793.

national copyright authority on behalf of unlocatable copyright owners.⁴² The United States and the European Union are currently looking into similar legislation although there are several difficulties that need to be addressed, including a definition of “orphan work” and a defined threshold for the reasonable diligence that a hopeful user should use to search for an author. For example, the European Commission has put together a high-level expert group on the issues of digital preservation, orphan works and out-of-print works to address some of these issues in the European context.⁴³

Resale right

92. Resale rights (*le droit de suite*) are provided for optionally in the Berne Convention (Article 14*ter*) and are recognized in some but not all jurisdictions. These inalienable rights allow an artist (or his or her heirs) to receive a percentage of the selling price of a work of art when it is resold by an art-market professional (auctioneers, galleries or other art dealers); the goal is to allow artists to reap a financial benefits as their creative works increase in value. The European Union issued a directive on the issue in 2001 to harmonize its members’ approach to resale rights.⁴⁴ It will require each EU State to enact legislation giving artists a right to a percentage, on a sliding scale, of the profit made on the resale of their works for a period of their lifetime plus seventy years. Several Latin American and African countries also employ a resale right. The resale right could also be used as a benefit-sharing mechanism to funnel proceeds from the sale by auction houses of Indigenous art to artists and their communities.

Use of unfair competition principles to combat misappropriation of reputation associated with TCEs (“style”)

93. It is in fact often the reputation associated with a TCE, as embodied or represented by its distinctive “style”, that is the object of misappropriation. Protection in this context would include protection against false claims as to “authenticity” or community association or endorsement. The law of unfair competition and the common-law tort of passing off might be helpful. These may relate to protection of a style *per se* as an object of protection, or to protection against a misleading representation that is based on the use of a style or distinctive imagery or symbols. This discussion can also be applied to traditional designs.

94. Options in regard to the reputation associated with TCEs include:

- a) *Certification marks*: Indigenous communities in several countries have registered certification and/or collective trade marks or “authenticity labels”, such as Australia, New Zealand, Canada, United States of America (Alaska), Japan⁴⁵, Panama, Fiji.⁴⁶ (See also TK Gap Analysis Part III(a)(v) for discussion of protection of distinctive signs)

Comment [sb1]:

A cross reference has been inserted as certification marks are discussed at Part III(a)(v) of the TK Gap Analysis. As this section of TCE Gap Analysis is concerned with unfair competition principles, the text on certification marks could be moved to Part III(a)(v) of the TK Gap Analysis.

⁴² Copyright Act of Canada, Art. 77, available at <http://www.cb-cda.gc.ca/info/act-e.html#rid-33751>

⁴³ Report on Digital Preservation, Orphan Works, and Out-of-Print Works, i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, 2007.

⁴⁴ Directive on Resale Rights for the Benefit of the Authors of Original Works of Art, 2001.

⁴⁵ One Village One Product Initiative in Oita, Japan uses a certification system. The OVOP Initiative has since been introduced also in Thailand, Indonesia, Laos and Cambodia.

⁴⁶ See Consolidated Analysis

- b) *'Truth in advertising' and labeling laws*: The Indian Arts and Crafts Act, 1990 (the IACA) of the U.S.A. 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.⁴⁷
- c) *Geographical indications*: Several Committee participants have highlighted the potential use of geographical indications in this area. Some TCEs, such as handicrafts made using natural resources, may qualify as "goods" which could be protected by geographical indications. In addition, some TCEs may themselves be geographical indications, such as indigenous and traditional names, signs and other indications. Portugal, Mexico and the Russian Federation have provided relevant examples of the registration of geographical indications with respect to TCEs and related TK.⁴⁸
- d) *Unfair competition or trade practices law*: the general principles of unfair competition law, as embodied in Article 10*bis* of the Paris Convention and incorporated into the TRIPS Agreement, has been recognized in the Committee's discussion as useful. In addition, under specific trade practices legislation, a company in Australia 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.⁴⁹

Derivative works and the defensive protection of literary and artistic productions

95. This raises a number of fundamental policy issues which have been discussed at length in previous documents.⁵⁰

96. Some of the legal and cultural policy issues relevant to TCEs may pivot on whether or not to grant a right of adaptation in respect of TCEs, and on the exceptions and limitations that might be appropriate, as discussed before. An adaptation right applies to the making of derivative works based on EoF/TCEs: these works may separately qualify for copyright protection as original works. An adaptation right would allow the community or other rightsholder to prevent or authorize such a derivative work, or alternatively to receive an equitable remuneration for its use, when the work is derived from their EoF/TCE. If there is no such adaptation right, the community cannot control this use of its cultural materials and traditions.

97. One option is not to provide communities with an adaptation right in respect of their TCEs. This is the approach of the Model Provisions, 1982, which also provide a wide

⁴⁷ WIPO/GRTKF/IC/3/10, par. 122 (i).

⁴⁸ See WIPO/GRTKF/IC/5/3.

⁴⁹ See further WIPO/GRTKF/IC/5/3 and <<http://www.accc.gov.au/>> (April 7, 2003).

⁵⁰ See especially WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

exception in respect of ‘the borrowing of expressions of folklore for creating an original work of an author or authors.’⁵¹ This exception was specifically crafted to allow free development of individual creativity inspired by cultural expressions. The Model Provisions were not intended to hinder in any way the creation and subsequent IP protection of original works based on cultural expressions.

98. On the other hand, while denying copyright to authors of such derivative works who are not community members might discourage creativity and establish inequities between authors from within communities and those not, an option could be to oblige, through legislation, external authors to acknowledge the community whose traditions were used as a source of inspiration, to share benefits from exploitation of the copyright, and/or to respect some form of moral rights in the underlying traditions used. This is the approach adopted in the Pacific Model of 2002 and in the Draft Provisions on TCEs before the Committee.

Protocols, codes of conduct, contracts and other practical tools

99. Practical tools such as protocols, codes of conduct and contracts can play an immediately useful and practical role in addressing gaps in the protection provided to TCEs. A number of indigenous communities have, for example, developed their own IP-related protocols and model contracts for dealing with external requests for access to and use of their TCEs, and a number of cultural institutions and professional associations have also developed ethical and IP-related codes of conduct, model contracts and the like. Practical tools such as these can play a very valuable role in supplementing and/or clarifying the protection available under statutory and common law in ways that respond to the needs and aspirations of communities, including through recognition of elements of their customary laws. In order for such practical tools to be truly effective in practice, however, they must be accompanied by capacity-building aimed at strengthening the ability of communities to negotiate, draft, conclude and enforce protocols and contracts.

100. WIPO’s Creative Heritage Project⁵² is a response to this very need in relation to the management of IP when TCEs are recorded, documented and digitized. This capacity-building Project provides IP-related information and advice to both communities and museums, archives and other cultural institutions. A resource book for museums and other institutions is under preparation, as are practical guidelines for communities on the development by them of IP protocols. The Project also provides training to communities in cultural documentation and archiving. A pilot of this training program, for the Maasai community of Laikipia, Kenya will take place in September 2008. The pilot is being offered by WIPO in collaboration with the American Folklife Center (AFC) at the Library of Congress in Washington D.C. and the Center for Documentary Studies (CDS) at Duke University in North Carolina. The Project has established a public, searchable database of protocols, codes of conduct, model contracts and the like used by communities, museums and other institutions, professional associations and others. The Project also addresses management of IP issues in relation to arts festivals.

Registers and databases

⁵¹ Section 4 (1) (iii), Model Provisions, 1982.

⁵² See <http://www.wipo.int/tk/en/folklore/culturalheritage/index.html>

101. Registers, inventories, databases and lists of TCEs could play a role in their legal protection. See also discussion above on recordings and documentation of TCEs and the protection afforded under related rights to recordings. However, the recording and digitization of TCEs, even for valuable for cultural heritage safeguarding and promotion programs, can unwittingly make the TCEs vulnerable to unauthorized use and exploitation. Strategic management of IP, during TCEs recording, digitization and dissemination is therefore advisable (see on Creative Heritage Project above).

102. Some form documentation of TCEs can serve a range of functions, including as a confidential or secret record of TCEs reserved for the community only. Formal documentation and registries of TCEs support some *sui generis* protection systems. The draft TCE provisions before the IGC suggest a register only for sacred TCEs for which especially strong IP protection is desired, on the understanding that such registration would be optional and would increase certainty and transparency in a system for the protection of TCEs.⁵³

Collective management

103. With regard to challenges associated with the management of rights, existing collective management organizations (CMOs) are potentially a practical means of administering rights in TCEs. Committee participants⁵⁴ and CMOs themselves⁵⁵ have expressed interest in exploring this possibility further.

Performances of TCEs

104. Performances of TCEs are already protected on par with the protection provided to other performances. Although there are gaps in the protection provided, these apply to all performances and not specifically to performances of TCEs. Therefore, options for addressing them arise from ongoing discussions on the extension of the protection provided to performers generally under the WPPT, 1996. Practical tools such as protocols, codes of conduct and contracts can play an immediately useful and practical role in this area.

Designs

105. See above under Literary and Artistic Productions, especially under “Use of unfair competition principles to combat misappropriation of reputation associated with TCEs, including “style” and “Derivative works and the defensive protection of literary and artistic productions”. Further, practical tools such as protocols, codes of conduct and contracts can play an immediately useful and practical role in addressing gaps in the protection provided to TCEs

Secret TCEs

106. The following may be options for addressing the gaps identified above:

⁵³ See Articles 3 and 7 of the draft provisions.

⁵⁴ GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5).

⁵⁵ Such as the International Federation of Reprographic Rights Organizations (IFRRO).

- a) *Promissory estoppel*: The doctrine of promissory estoppel prevents one party from withdrawing a promise made to a second party if the latter has reasonably relied on that promise and acted upon it to his detriment. For example, a community which has relied on the verbal commitments of a researcher not to disclose any secret information revealed to him or her would be able to use this doctrine to prevent the researcher from disclosing the information. This could be another basis on which to address cases such as *Mountford*. Use of such a doctrine could also protect information that is not necessarily commercially valuable.
- b) *Protocols, contracts, consent forms*: See discussion above. These practical tools could also be very useful in regulating access to secret TCEs.
- c) *Registers and databases*: See discussion above. Confidential registers and databases could serve to preserve the TCEs and, coupled with appropriate contracts and consent forms, be used to control access to and use of the TCEs on terms set by the community.

Indigenous and traditional names, words and symbols

107. In respect of defensive protection, certain regional organizations and States have already taken steps to prevent the unauthorized registration of Indigenous marks as trademarks. These are national measures or measures applicable within an regional organization, and their interpretation and implementation in other countries has yet to be tested. These are reported on in detail in previous documents and include:

(i) 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;”

(ii) 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.⁵⁶ The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe;⁵⁷ and

(iii) the New Zealand Trade Marks Act requires the registration of a trademark (or part of a trademark) to be refused if its use or registration is considered likely to offend a

⁵⁶ See “Report on the Official Insignia of Native American Tribes,” September 30, 1999.

⁵⁷ *Ibid.*, pp. 24-26.

significant section of the community, including the Indigenous people of that country, the Maori.⁵⁸

[Annex follows]

⁵⁸ The Act is available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/049.html>

ANNEX

<i>Protection desired for ...</i>	A. Existing Protection	B. Gaps	D. Options
<i>Literary and Artistic Productions</i>	<ul style="list-style-type: none"> <input type="checkbox"/> Copyright protection for contemporary expressions of traditional cultures <input type="checkbox"/> Article 15.4 of the Berne Convention – copyright protection for unpublished works of unknown authors <input type="checkbox"/> Collections, compilations and databases of TCEs <input type="checkbox"/> Recordings and documentation of TCEs 	<ul style="list-style-type: none"> <input type="checkbox"/> Pre-existing TCEs are unlikely to meet the ‘originality’ requirement <input type="checkbox"/> Copyright law does not provide protection to the ‘style’ of a work <input type="checkbox"/> No explicit communal rights protection <input type="checkbox"/> Term of protection limited <input type="checkbox"/> The “public domain” and other exceptions and limitations <input type="checkbox"/> Derivative works and defensive protection <input type="checkbox"/> Rights in recordings and documentation 	<ul style="list-style-type: none"> <input type="checkbox"/> Judicial recognition of communal rights <input type="checkbox"/> Communal moral rights <input type="checkbox"/> Clarification of Article 15.4, Berne <input type="checkbox"/> <i>Domaine public payante</i> <input type="checkbox"/> Orphan works <input type="checkbox"/> Resale rights <input type="checkbox"/> Use of unfair competition principles to combat misappropriation of reputation associated with TCEs (“style”) <input type="checkbox"/> Derivative works and the defensive protection of literary and artistic productions <input type="checkbox"/> Protocols, codes of conduct, contracts and other practical tools <input type="checkbox"/> Special, stand-alone law <input type="checkbox"/> Registers and databases <input type="checkbox"/> Collective management

<i>Protection desired for ...</i>	A. Existing Protection	B. Gaps	D. Options
<i>Performances of TCEs</i>	<input type="checkbox"/> Protection provided by the WPPT, 1996	<input type="checkbox"/> Limited term of protection for fixed performances <input type="checkbox"/> WPPT, 1996b limited to aural performances	<input type="checkbox"/> Protocols, codes of conduct, contracts and other practical tools <input type="checkbox"/> Special, stand-alone law <input type="checkbox"/> Extension of WPPT, 1996 to audiovisual sector
<i>Designs</i>	<input type="checkbox"/> Industrial designs protection for contemporary designs <input type="checkbox"/> Collections, compilations and databases of traditional designs	<input type="checkbox"/> Pre-existing designs are not protected <input type="checkbox"/> Term of protection for designs limited <input type="checkbox"/> Formalities	<input type="checkbox"/> Use of unfair competition principles to combat misappropriation of reputation associated with TCEs (“style”) <input type="checkbox"/> Protocols, codes of conduct, contracts and other practical tools <input type="checkbox"/> Special, stand-alone law <input type="checkbox"/> Registers and databases

<i>Protection desired for ...</i>	A. Existing Protection	B. Gaps	D. Options
<i>Secret TCEs</i>	<input type="checkbox"/> Provisions in the TRIPS Agreement and Paris Convention for the protection of unfair competition and undisclosed information <input type="checkbox"/> Common law protection for confidential information	<input type="checkbox"/> Provisions of unfair competition mainly applicable to industrial and commercial information <input type="checkbox"/> Definitions of “disclosed” and “confidential”	<input type="checkbox"/> Promissory estoppel <input type="checkbox"/> Protocols, codes of conduct, contracts and other practical tools <input type="checkbox"/> Special, stand-alone law <input type="checkbox"/> Registers and databases
<i>Indigenous and traditional names, words and symbols</i>	<input type="checkbox"/> Defensive protection – provisions for the protection of unfair competition + protection against marks contrary to morality or public order and deception <input type="checkbox"/> Positive protection – use of trademark laws	<input type="checkbox"/> Concepts of “contrary to morality” and “contrary to public order” mainly judged from the general public perspective and not necessarily tailored to TCEs	<input type="checkbox"/> “ <i>Sui generis</i> ” provisions in national trademark laws (NZ, Andean Community, USA) <input type="checkbox"/> Protocols, codes of conduct, contracts and other practical tools <input type="checkbox"/> Special, stand-alone law <input type="checkbox"/> Registers and databases

C. Relevant considerations:

- (i) the level at which a gap could be or may need to be addressed (the international, regional, national and/or local levels)
- (ii) the choice of measures to use for addressing the gaps (legislative action, the development of practical tools, capacity-building)
- (iii) the degree to which the protection of TCE subject matter is under discussion in other international forums and to which extent TCEs are already the object of protection under legal instruments in other policy areas
- (iv) policy implications
- (v) economic, cultural and social objectives
- (vi) specific technical and legal questions
- (vii) operational questions: rights management and compliance

[End of Annex and of document]