

Suggested Changes and Improvements to WIPO
from
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for the
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DRAFT

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

The document is very well written with great ideas and issues to be addressed. The changes and improvements I am suggesting could make the document a bit easier to read and understand.

Suggested Ideas to be Added

My last document emailed to WIPO three or four months ago started with the following paragraph which I've included here so you'll understand the perspective I have in my understanding and suggested changes.

In the process of establishing TKEC or GRTKF laws, the main focus should always be the identification of the history of our human creativity and the elements of our cultures that have become significant parts of our human evolution. Clearly, our creators are individuals who are influenced by the rules and perspectives of their families and their cultures including their friends, coworkers, clans, tribes, religious groups, employers, companies and governments. And their creativity often is based on discovering new ways to use the earth's resources and human abilities and the desire to establish better philosophies for their people to follow. Even when we may not fully understand or appreciate the elements our fellow humans have discovered or created in another part of the world, at least our human history should be fully documented and open for education and learning by everyone. The more we learn about each other and the philosophies and elements of creativity that have been produced throughout the world, the better our lives can be when we have a greater vision of life and a greater ability to understand and respect each other.

One part of the Traditional Knowledge and Expressions of Culture (TKEC) bill¹ (that is still pending enactment by Palau's legislators) is a way to deal with existing documents and products protected by copyright that were produced prior to the enactment of the bill and were not subsequently submitted to the government for approval after the bill was enacted. For instance, if you were a tourist exploring a new country, wouldn't it be nice to be able to buy a book, song, video or piece of artwork that captures elements of that country's culture? In choosing what to

¹ The bill is based on the TKEC bill that was drafted at the Pacific country meeting in 2002 directed by Wend Wendland. Wend has a copy of the bill pending here that has several changes I have added.

buy, wouldn't you prefer a product that is officially identified as accurately reflecting the culture or other unique aspects of that culture? A part of the Palau bill has a requirement that products with elements of Palau's culture involved that were created prior to the enactment of the bill, and are not submitted to the government for approval after the enactment of the bill, must have a label attached to such products that reads: "This product includes elements of Palauan traditional knowledge or expressions of culture which have been used without the express guidance or approval of the traditional owner." Based on the foregoing, I would like to add the words underlined below:

Page 9 section 25(iii) in the last line: "IP rights that are considered prejudicial to the community's interests or IP rights that are not certified for accuracy by the community."

Page 9 section 27(a) in the last line: "distribution, description, performance and other such acts, especially commercial use;"

Page 9 section 27(d) "prevention of the failure to acknowledge source and approval when TCEs are used;"

Page 10 section 29 in line 4: "and symbols unless approved by the traditional culture. The possible use of patent"

Page 13 section 39 table "Desired protection:" column number (iii): "prevention of false and misleading claims to authenticity and origin by certification of accuracy by the community."

I will not propose any changes to *Secret TCEs* starting on page 17 with section 48 because I have a hard time accepting the idea held by many people throughout the world that elements of a culture may not be shared with other humans in other parts of the world. Obviously, I believe that members of individual cultures who create a special and unique religious way, for instance, should be wanting others to follow their way, too. And the way to do that is to document it and get its source properly identified so that if it's a good way, it could help the world. When others adopt it with the acknowledgment of the source of the new way, it could even become a source of pride. It could also become a source of royalty revenue for the culture if the idea gets published and they have an agreement with the publisher via agreements between their governments.

Page 14 section 51 I propose adding: "There are ~~two~~ three 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 trademarks² and geographical indications ; and

² Trademark is spelled as one word in American English like the original spelling in

(c) Positive promotion: the identification of the traditional names, words or symbols as being accurately used or described, with the cultural source clearly identified, helps preserve and promote the culture and assists in its survival.

Page 21 section 56(e) I propose adding to the end of the last sentence, “ . . . and cannot object: but will have the power to transmit to those receiving the cultural information that the item is without the express guidance or approval of the traditional owner.”

The rest of the document includes much of what I see as the issues to be addressed. I greatly appreciate all you have done and your ability to help international creativity grow and be respected by all nations.

Consistent Format

I suggest that each numbered section have formats that are the same throughout the document. The current formats make me wonder if there is some special meaning or interpretation intended by the format differences. For example, on page 10, numbers 32 and 33 have different formats for the subsections listed. Number 32 has (i) and (ii) with the un-capitalized first letters with semicolon followed by “and/or”. Number 32 is also indented probably with one tab hit. Number 33 apparently has two tab hits for the indentation and has parenthesized letters for each subsection. Also each subsection has italicized opening words with first letters capitalized. Also there is no “and” or “and/or” between subsection (f) and the last subsection (g). I suggest that each numbered section have the same format:

- subsections indent one tab space;
- subsections be identified by letters with left and right parentheses; and
- “and”, “or” or “and/or” be added at the end of each second-to-the-last subsection depending on the meaning intended.

You will also see that the subsections on pages 14 and 15 only have one parenthesis for the letter subsections such as a) and b) and the subsections are with one tab indent in section 42 and with a two tab indent in section 41. My guess is that these sections were written by different people initially and just have not been finally edited. Hopefully it will be done so that the reader does not become a bit concerned about a meaning intended by the differences.

Typographical Errors

Throughout the document the word “indigenous” is sometimes typed as “Indigenous”. Is there some special meaning associated with the capitalized one? If so, I suggest that it be defined at the beginning of the document as part of the “Introduction”. Otherwise, I suggest having them all read “indigenous” (unless it is the first word of a sentence, of course).

Page 6, number 10. The first line has “range of tangible, tangible and mixed forms”. Shouldn’t that read: “range of tangible, intangible and mixed forms”?

subsection (a).

Page 25, Section 78(f) has “be? And.” written at the end of the subsection. I suggest it should read: “be?; and”.

Page 26 Section 82, second line has “the held that” which I believe should read “they held that”.