



## PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: THEN AND NOW

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### I. INTRODUCTION

The world has reached a stage of inventive proportions with technology stretching its arms to areas which were not known to the world but to those to whom it existed. This has posed global threat to the hitherto sacrosanct world of cultural heritage. “Expressions of folklore or elements of folklore were subjected to wide- scale commercial exploitation without any benefit flowing to the community who were the creators and the preservers of the folklore. Minimal respect or regard was shown to the custodians of the folklore in the worldwide commercialization process. As a progressive marketing strategy many of the exploiters resorted to mass-scale distortion hurting the cultural and social and even religious sentiments of the communities who had preserved the elements of folklore for centuries as their precious possessions.”<sup>1</sup> It is indeed this phenomenon that has prompted the World Intellectual Property Organisation (hereinafter WIPO) to recently draw up Draft Articles for the Protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (hereinafter TCEs). Before we embark on the possibility of having a codified legislation it is important for us to know why there is a need for such protection. This article is an attempt to understand the term ‘Traditional Cultural Expressions’, to give protection to these ‘expressions’, to afford rights to the holders of these expressions, etc. An attempt will be made to look at the latest Draft Articles drawn up by WIPO to answer questions raised on TCEs.

### II. WHAT ARE TRADITIONAL CULTURAL EXPRESSIONS (TCEs)?

The term Traditional Cultural Expressions (TCEs) refers to the work of indigenous people and the traditional communities, but there is no precise definition to it. TCEs in the international community are also referred to as “folklore”. Folklore is a term coined by William Thomas in the year 1846 and means “the traditional beliefs, myths, tales and practices of a group of people, transmitted orally, from one generation to another. Mr. Thomas meant to include manners, customs, observations, superstitions, ballads, proverbs and so on in the term ‘folklore’ which he summarized as the lore of the people.”<sup>2</sup>

TCEs are the synonym of ‘Expressions of Folklore’. According to the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions<sup>3</sup> adopted by UNESCO in 1982, “expressions of folklore” means productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community or by individuals reflecting the

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<sup>1</sup>Available at: <http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf>. (last visited on Mar. 23, 2018).

<sup>2</sup>Thomas was a British antiquarian who wanted a simple term to replace various awkward phrases floating around at the time to discuss the same concept; phrases such as “popular antiquities”, “the lore of the people”, and the manners, customs, observances, superstitions, ballads, proverbs etc, of the olden times”.

<sup>3</sup>Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=184668](http://www.wipo.int/wipolex/en/text.jsp?file_id=184668) (last visited on Mar. 23, 2018).

traditional artistic expectations of such a community. TCEs are in two forms, tangible and intangible. These include:

- (i) Verbal Expressions or symbols (folk stories, legends and poetry)
- (ii) Musical Expressions (songs, instrumental music)
- (iii) Expressions by action (dance form, play, ritual etc)
- (iv) Tangible Expressions (production of folk arts, especially drawings, paintings, sculpture, pottery, jewels, costumes, musical instruments and architectural works).

The main characteristics of TCEs are<sup>4</sup>:

- (i) “they are handed down from one generation to another, either orally or by imitation;
- (ii) they reflect a community’s cultural and social identity;
- (iii) they consist of characteristic elements of a community’s heritage;
- (iv) they are made by ‘authors unknown and/or by individuals communally recognised as having the right, responsibility or permission to do so;
- (v) they are often not created for commercial purposes, but as vehicles for religious and cultural expressions; and
- (vi) they are constantly developing and being recreated within the community.”

### III. INTELLECTUAL PROPERTY PROTECTION

The Berne Convention for the Protection of Literary and Artistic Works<sup>5</sup> (Berne Convention) as an international convention “treats folklore as a special category of anonymous works.” Article 15(4) of the Berne Convention was amended in the year 1967 to introduce optional copyright protection for folklore. The Article states that:

“in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of the country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”<sup>6</sup>

In 1976, the Tunis Model law on Copyright for Developing Countries was adopted. It included *sui generis* protection for expressions of folklore. It goes a few steps further than the Berne Convention by explicitly including ‘folklore’ in the list of protected works and providing that works of national folklore are to be protected against improper exploitation.<sup>7</sup>

The World Intellectual Property Organisation began to explore the field of TCEs in 1978. It convened three meetings of experts in cooperation with the United Nations Educational, Scientific and Cultural Organisation that led to the adoption in 1982 of the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (the Model Provisions). The Model Provisions developed a *sui generis* model for the IP- type protection of TCEs. They establish two main categories of acts against which TCEs are protected, namely ‘illicit exploitation’ and ‘other prejudicial actions.’

<sup>4</sup>See Documents WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/13/4(b) Rev. Annex I, 4.

<sup>5</sup>Berne Convention for the Protection of Literary and Artistic Works.

<sup>6</sup>*Id.* at art.15(4).

<sup>7</sup>Daphne Zografos, *Intellectual Property and Cultural Expressions* 27 (Edward Elgar Publishing Limited, UK, 2010).

In December, 1996 WIPO Member States adopted the WIPO Performances and Phonograms Treaty (WPPT)<sup>8</sup> which authorizes neighboring rights to artists who perform folklore. Performers of folklore thus enjoy moral rights and various economic rights provided by the WPPT. “However, protection in the WPPT is only applicable for those kinds of folklore that can be sung, performed and played. For tangible folklore such as traditional handicrafts, the WPPT does not provide protection.”<sup>9</sup>

In April 1997, the ‘UNESCO- WIPO World Forum on the Protection of Folklore’ was held in Phuket, Thailand.<sup>10</sup> In 1999, WIPO organized regional consultations on the protection of expressions of folklore for African countries (March 1999), for countries of Asia and the Pacific region (April 1999), for Arab countries (May 1999), and for Latin American and the Caribbean (June 1999). Each of the consultations adopted resolutions or recommendations, which included the recommendations that WIPO and UNESCO increase and intensify their work in the field of folklore protection. The recommendations unanimously specified that future work in these areas should include the development of an effective international regime for the protection of expression of folklore.

In late 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established. Representatives from the WIPO member states, ethnic communities and NGOs joined the discussions. The Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns of practitioners and custodians of traditional cultures. The studies have formed the basis for ongoing international policy debate and assisted in the development of practical tools. Drawing on this diverse experience, the Committee is moving towards an international understanding of the shared objectives and principles that should guide the protection of TCEs.

In 2007, the United Nations adopted the U.N. Declaration on the Rights of Indigenous Peoples which highlighted the need to final legal approaches that fall outside the framework of the Berne Convention. Since 2012, the IGC has already held 28 sessions relating to genetic resources, TK and folklore and the latest session was held between July 7-9, 2014. In this session the WIPO Secretariat prepared a text titled ‘The Protection of Traditional Cultural Expressions: Draft Article’. The Draft Article provides a detailed sui generis system for the protection of folklore including 4 objectives,<sup>11</sup> definition of TCEs (subject matter) and criteria for their protection,<sup>12</sup> detailed definition of beneficiaries, their protection/ safeguarding,<sup>13</sup> criteria for eligibility for their protection/safeguarding,<sup>14</sup> administration of rights/ interests which includes responsibilities and functions of competent authority in collective management of rights,<sup>15</sup> exceptions and limitations,<sup>16</sup> term of protection/ safeguarding,<sup>17</sup> sanctions,<sup>18</sup> national treatment.<sup>19</sup> The provisions of the Draft Articles are more practical and

<sup>8</sup>WIPO Performances and Phonograms Treaty (WPPT), 1996.

<sup>9</sup>Luo Li, *Intellectual Property Protection of Traditional Cultural Expressions (Folklore in China)* 9 (Springer International Publishing, Switzerland, 2014).

<sup>10</sup> Available at: <http://www.wipo.int/tk/en/cultural/index.html> (last visited on 25th Apr. 2015).

<sup>11</sup>The Protection of Traditional Cultural Expressions: Draft Articles, WIPO Doc WIPO/GRTKF/IC/28/6 (2014) Objectives.

<sup>12</sup>*Id.* at art.1.

<sup>13</sup>*Id.* at art. 2.

<sup>14</sup>*Id.* at art.3.

<sup>15</sup>*Id.* at art. 4.

<sup>16</sup>*Id.* at art. 5.

<sup>17</sup>*Id.* at art. 6.

<sup>18</sup>*Id.* at art. 8.

<sup>19</sup>*Id.* at art.11.

operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article, due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore.

It is therefore clear that a need to protect the rights of the culture of the indigenous peoples has been deeply recognized not just by WIPO but through different international and national legislations as well. As has been mentioned the most recent document is the Draft Article prepared by WIPO titled 'The Protection of Traditional Cultural Expressions: Draft Article'. Our purpose in writing this article is an attempt to find out whether this document will indeed be the answer that the legislators, law makers, scholars and academicians are waiting in context to the protection of traditional cultural expressions.

### ***The Protection of Traditional Cultural Expressions: Draft Articles***

"The Draft Articles Prepared by WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at its 28<sup>th</sup> Session held in July, 2014 provide a detailed *sui generis* system for the protection of folklore. The provisions of the Draft Articles are more practical and operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article, due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore."<sup>20</sup>

The beneficiaries of protection in Article 2 of the Draft<sup>21</sup> extend to indigenous peoples and local communities only but not other communities. While the concept of "peoples" includes "nations" and acknowledges that within a "people", families, individuals and other subsets thereof may have closer association to the TK and TCEs, ownership of the knowledge remains with the collective. Thus there is no need to enumerate subsets of peoples when identifying branches. This option makes it clear that the people given protection will be within this definition.

Article 3 of the Draft incorporates the scope of protection and states that Indigenous Peoples have the right to maintain, control, protect, and develop their intellectual property interests over their TCEs. This protection maybe made possible through indigenous laws, customs and regulations administered through their own institutions and decision- making procedures.

States will need to take effective measures, including financial and technical assistance for ensuring that Indigenous Peoples are empowered to exercise these rights at the local, national, regional and international levels. To prevent unauthorized access to and utilization of their TCEs, Indigenous Peoples should be empowered to: define the subject matters using their terms; identify rightful holders; affirm that agreements are reached with free and prior informed consent (FPIC) and mutually agreed terms (MAT); ensure fair and equitable benefit- sharing; ensure adequate and appropriate disclosure and determine limitations on the utilization of TCEs. States may be required to affirm these provisions in national laws but in no way should such laws deprive Indigenous Peoples of their rights. The

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<sup>20</sup>*Supra* at 9.

<sup>21</sup>*Id.* at art. 2.

standard for protection should be equal and be based on whether or not FPIC has been obtained to prior access and utilization of the knowledge, even if it is not secret or sacred.

Administration of Rights (Article 4) states that Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. In order to fulfill this Member States/Contracting parties are obligated to establish any national administrative body upon request of Indigenous Peoples, in full partnership with them, for their benefit and only with their FPIC. Indigenous institutions at the national level, created by Indigenous Peoples themselves, and provided with financial and administrative support from the Government would be an appropriate institution for protection of Indigenous Peoples' rights to their TCEs.

Exceptions and Limitations as per Article 5 of the Draft states that it should be determined by the Indigenous Peoples. The General Exceptions Clause<sup>22</sup> incorporates that "such limitations and exceptions must be made available provided the use of protected TCEs acknowledges the beneficiaries, where possible; is not offensive or derogative to the beneficiaries; is compatible with fair use/dealing/practice; does not conflict with the normal utilization of the TCEs by the beneficiaries and does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties. Where however, reasonable apprehension of irreparable harm related to sacred and secret TCEs, Member States/ Contracting Parties are not required to establish limitations and exceptions."

The Specific Exceptions Clause<sup>23</sup> mentions that "subject to the limitations in the previous paragraph, Member States/Contracting Parties may adopt appropriate limitations or exceptions, in accordance with national law, for the purposes of teaching, learning but not research resulting in profit-making or commercial purposes;<sup>24</sup> for preservation, display, research and presentation in archives, museums, libraries or cultural institutions, for non-commercial cultural heritage or other purposes in the public interest;<sup>25</sup> and the creation of an original work of authorship inspired by TCEs."<sup>26</sup> This provision is not applicable to protected TCEs described in Article 3.2. Regardless of whether such acts are permitted under Paragraph 1, the use of TCEs in cultural institutions recognized under the appropriate national laws, archives, libraries and museums for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted<sup>27</sup> and also the creation of an original work of authorship inspired by TCEs.<sup>28</sup>

Article 5.5 is an Exception Clause providing for "the protection of secret TCEs against disclosure, to the extent that any act would be permitted under the national law for works protected by copyright, or signs and symbols protected by trademark law, such act is not to be prohibited by the protection of TCEs."

Article 6 dealing with term of protection provides two options of protection. "Option 1 allows the Member States/Contracting Parties to determine the appropriate term of protection of TCEs in accordance with Article 3 and they may also determine that the protection granted to TCEs against any distortion, mutilation or other modification or

<sup>22</sup>*Id.* at art.5(1) and art. 5(2).

<sup>23</sup>*Id.* at art. 5(3), art. 5(4) and art.5(5).

<sup>24</sup>*Id.* at art. 5(3)(a).

<sup>25</sup>*Id.* at art. 5(3)(b).

<sup>26</sup>*Id.* at art. 5(3)(c).

<sup>27</sup>*Id.* at art. 5(4)(a).

<sup>28</sup>*Id.* at art. 5(4)(b).



infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong and that such protection to last indefinitely.”<sup>29</sup>

In Option 2 Member States/Contracting Parties may determine the term of protection of TCEs, at least as regards their economic aspects and is to be limited.<sup>30</sup> Indigenous Peoples own their TCEs in perpetuity. Thus, legitimate utilization should be for a term agreed upon, provided that all rights over the knowledge revert to Indigenous Peoples upon expiration of the agreed term.

“Sanctions, remedies and exercise of rights in Article 8 make mention of two (2) Options wherein Member States/ Contracting Parties can provide appropriate legal, policy or administrative measures, in accordance with national law, to ensure the application of this instrument<sup>31</sup> or provide accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, including criminal and civil remedies, to ensure the application of this instrument.<sup>32</sup> In case of dispute arising between beneficiaries, or between beneficiaries and users of TCEs, each party is to refer the issue to an independent dispute resolution mechanism recognized by international, regional or national law.<sup>33</sup> The means of redress for safeguarding the protection granted by this instrument is to be governed by the national of the country where the protection is claimed.”<sup>34</sup>

Transitional measures in Article 9 lays down the opportunity to be given to Indigenous Peoples to account for knowledge that has been misappropriated from their communities and provided with fair, independent, impartial, open and transparent remedies to address misappropriated TCEs. With respect to TCEs that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries are to be given a right to recover such TCEs.<sup>35</sup>

Article 10 discusses the relationship of the Draft provisions with other international agreements. It states that “Member States are required to implement this instrument in a manner mutually supportive of other existing international agreements and nothing in this instrument is to be construed as diminishing or extinguishing the rights that Indigenous Peoples or local communities have now or may acquire in the future.”<sup>36</sup>

Article 11 includes the National Treatment principle. The rights and benefits arising from the protection of TCEs under national measures or laws that give effect to this instrument is to be made available to all the beneficiaries that meet the criteria outlined in Article 2 who are nationals or residents of Member State/ Contracting Party to this instrument.<sup>37</sup>

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<sup>29</sup>*Id.* at art. 6(1).

<sup>30</sup>*Id.* at art.6(2).

<sup>31</sup>*Id.* at art. 8(1) Option 1.

<sup>32</sup>*Id.* at art. 8(1) Option 2.

<sup>33</sup>*Id.* at art. 8(2).

<sup>34</sup>*Id.* at art.8(3).

<sup>35</sup>*Id.* at art. 9(3).

<sup>36</sup>*Id.* at art. 10(1) and art.10(2).

<sup>37</sup>*Id.* at art. 11(1).

Foreign beneficiaries that meet the criteria outlined in Article 2 are also entitled to enjoy the same rights and benefits enjoyed by beneficiaries who are nationals of the Member State/Contracting Party of protection.<sup>38</sup>

Article 12 and Trans-Boundary Cooperation provides that in instances where TCEs are located in territories of different Member States/Contracting Parties, the states parties are to cooperate in addressing instances of trans-boundary TCEs, with the involvement of Indigenous Peoples and local communities concerned, where applicable, with a view to implementing this instrument.<sup>39</sup> A regional indigenous body, set up with minimal intervention from States, could be a model for dealing effectively with Indigenous Peoples TCEs in a trans-boundary context.

Article 13 deals with capacity building and creating awareness. It makes it incumbent upon Member States/Contracting Parties to cooperate in capacity building, capacity development and strengthening of human resources and institutional capacities to effectively implement the instrument in developing countries, in particular least developed countries. In this context states/parties should facilitate the involvement of Indigenous Peoples' and local communities and relevant stakeholders, including non-governmental organizations and the private sector.<sup>40</sup> With a view to create this awareness and in particular to educate users and owners of TCEs of their obligations under this instrument States Parties are to take certain measures which include, promoting the instrument; organizing meetings of indigenous and local communities and relevant stakeholders; establishment and maintenance of a help desk for indigenous and local communities and relevant stakeholders; promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders; promotion of, as appropriate, domestic, regional and international exchanges of experience; involvement of indigenous and local communities and relevant stakeholders in the implementation of this instrument; and awareness raising of community protocols and procedures of indigenous and local communities.<sup>41</sup>

#### IV. CONCLUSION AND SUGGESTIONS

Indigenous Peoples have a Right to Self- Determination<sup>42</sup> and by virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development. Indigenous Peoples have sovereignty over their resources<sup>43</sup> and by virtue of this sovereignty; they retain their rights over their resources even in cases of unauthorized access and when the term of legitimate use has expired. There is therefore an inherent incompatibility between the existing intellectual property regime, which is trade and market-based, and the way Indigenous Peoples view their TCEs. The Draft Article prepared by WIPO is a very good model however it may be seen that this document is not without flaws and some further suggestions may be incorporated before the Draft becomes acceptable as a binding document.

<sup>38</sup>*Id.* at art. 11(2).

<sup>39</sup>*Id.* at art.12.

<sup>40</sup>*Id.* at art.13(1).

<sup>41</sup>*Id.* at art. 13 (a) to (e).

<sup>42</sup>United Nations Declaration on the Rights of Indigenous Peoples, art. 3.

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Available

<http://www.un.org/esa/socdev/unpfii/documents/Report%20by%20Erica%20Irene%20A.%20Daes.pdf>  
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Suggestions:

1. The definition of Indigenous Peoples TCEs should be guided by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and developed by the United Nations' mandates on Indigenous Peoples rights.
2. Access to and use of TCEs requires free, informed and prior consent (FPIC) from Indigenous Peoples. Failure to obtain FPIC in accordance with the requirements of Indigenous Peoples' laws is an infringement of their intellectual property rights. TCEs are protected only when authorization of use is granted by the peoples themselves.
3. Public domain does not guarantee free use of material when it is done without proper authorization. In such situations, Indigenous Peoples' must retain their rights over their intellectual property and must be entitled to remedy.
4. National laws must be developed in full consultation with and appropriate authority from Indigenous Peoples. These laws may provide for protection of Indigenous Peoples' intellectual property rights.
5. Indigenous Peoples should have access to just and fair procedures to resolve disputes over their rights, and to effective remedies of infringement of their intellectual property rights. Such procedures and remedies shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples' concerned and international human rights.
6. Indigenous Peoples own their knowledge in perpetuity and the rights over their knowledge revert to Indigenous Peoples upon expiration of the agreed term of utilization. Protection of TCEs as such shall therefore be not subject to any formality.
7. As far as trans-boundary measures are concerned, a regional indigenous body, set up with minimal intervention from States, could be an effective model for dealing with TCEs of Indigenous Peoples.

As discussed, various attempts have been made at the international, national and regional levels for the protection of TCEs. "One can see that the provisions of the Draft Articles on TCEs are more practical and operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore."<sup>44</sup>

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<sup>44</sup>*Supra* n. 9.