

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**EXPRESSIONS OF FOLKLORE AND ITS
INTERNATIONAL PROTECTION**

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EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

I. INTRODUCTION

A. Background

1. Folklore has always been considered as part of the common heritage of the community without individual ownership, and there were no formal or informal laws in many developing countries, which specifically bestowed ownership rights of folklore on any community or group of persons, and prohibit its exploitation without their consent. This led to widespread exploitation of folklore inside and outside the State concerned.

2. The need for a strong legal mechanism for the protection of folklore has been a subject of discussion at the national and international levels since 1960s, and the two main international fora where most of the discussions were held, were the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of folklore, UNESCO is concerned with the general protection. Apart from this, the African Intellectual Property Organization (OAPI), a regional organization reflects the collective thought of the like-minded States for the legal protection of creations of folklore.

3. The WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “IGC”) in order to analyse *inter alia*, intellectual property issues that arise in the context of the protection of expressions of folklore.¹ The WIPO General Assembly extends the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection.²

4. The Secretary-General of AALCO realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role that AALCO could play in formulating an international instrument, proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the item “Expressions of Folklore and its International Protection” on the Agenda of the Forty-Third Session of AALCO held in Bali (Republic of Indonesia) from 21-25 June 2004. This proposal was in line with Article 1 (b) of the AALCO’s Statutes which provides for exchange of views and information on matters of common concern having legal implications. The AALCO Member States welcomed the proposal and the item was deliberated at the Forty-Fifth (2006) and Forty-Sixth (2007) Sessions. At the Forty-Seventh Session the Member States through a resolution requested the Secretary-General to monitor and report the outcome of the IGC Sessions and directed the Secretariat to follow-up the developments within the WIPO and submit a report at the next Session.³

¹ WO/GA/26/6, paragraph 13, and WO/GA/26/10.

² WO/GA/20/8, paras. 94 and 95.

³ RES/46/S 14.

5. As a follow-up, this report provides an overview of the work of the WIPO Intergovernmental Committee since its inception in 2001, focusing its attention on the recently concluded Thirteenth Session of the Committee held in October 2008 and the documents circulated at the Session for the consideration of the Member States. A tabular column of draft Gap Analysis on the Protection of Traditional Cultural Expressions (TCEs)/Expressions of Folklore (EoF) circulated by the WIPO Secretariat has also been annexed.

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

A. Introduction

6. The subject “expressions of folklore,” was first initiated by WIPO in cooperation with UNESCO in early 1978. During that time, it was considered as a subject of traditional knowledge. Since then the work on expression of folklore has progressed to a more advanced stage, than the work on traditional knowledge in general. Apart from the piecemeal amendments in the existing intellectual property regime (IPR) for the protection of folklore, the major achievement was the adoption in 1982 of the Model Provisions on the Protection of Expressions of Folklore.

7. The Model Provisions were the result of several joint meetings convened by the WIPO and UNESCO to study the draft model provisions. The outcome of the meeting was submitted to the Committee of Governmental Experts, convened by the WIPO and UNESCO at Geneva in 1982, which adopted the famous “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (Model Provisions)”. The Model Provisions have attempted to achieve a balance between protection against abuses of expressions of folklore, on one hand and the freedom, and encouragement of folklore, on the other.

8. While the WIPO had been attempting to protect the “expressions of folklore” through piecemeal amendments in various international instruments, no comprehensive attempt was made to draft an international instrument for its protection. In this regard, WIPO and UNESCO met at Phuket, Thailand in April 1997 at the meeting of World Forum on the Protection of Folklore which was attended by more than 180 participants from approximately 50 countries. The major outcome of the meeting was the recognition of the need for preservation and conservation of folklore throughout the world, legal means of protection of expressions of folklore within national regimes, economic repercussions of exploitation and international protection of expressions of folklore.

9. In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. The consultations recommended that WIPO should increase and intensify its work in the field of folklore protection and

recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, Latin American Countries Recommendations) and also considered the UNESCO-WIPO Model Provisions to be an adequate starting point and relevant groundwork for future work in this direction. The African countries recommended developing, in the shortest possible time, a broad consensus among States in favor of an international regime.⁴

10. Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from 26 September to 3 October 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on the following general terms:

11. The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultation: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.⁵

12. In September 2003, the WIPO General Assembly at its Thirtieth Session decided to extend the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection.⁶ The new mandate excludes no outcome of the IGC's work, including the possible development of an international instrument or instruments in this field.⁷

B. Work of the IGC on the Protection of Expressions of Folklore from First to Twelfth Sessions

13. The Committee's work programme focused an ongoing technical analysis of the use of existing intellectual property and *sui generis* approaches for the protection of expressions of folklore. The Committee's work has so far resulted in draft Provisions on Objectives and Principles for the Protection of the Expressions of Folklore.

14. The Committee has built its work on the existing basis of consultations and earlier work done by its various bodies. An active programme of consultation and dialogue has complemented the formal proceedings of the Committee, with emphasis on the fostering of regional dialogue, and the enhanced participation of indigenous and local communities

⁴ See documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPO-UNESCO/FOLK/ARAB/99/1, paragraph II(b) 6; WIPO-UNESCO/FOLK/LAC/99/1, page 3). Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, WIPO General Assembly Twenty-Sixth (12th Extraordinary) Session Geneva, September 25 to October 3, 2000, WO/GA/26/6.

⁵ WO/GA/26/6, paragraph 13, and WO/GA/26/10.

⁶ WO/GA/20/8, paras. 94 and 95.

⁷ WIPO Press Release PR/2003/362, 29 September 2003.

in WIPO activities. The Committee has also provided a framework for interaction with other international processes concerned with Intellectual Property (IP) aspects of Expressions of Folklore. Also a coordinated series of case studies and presentation on national experiences provides an additional source of practical information for holders of Expressions of Folklore and for policymakers alike.

15. The Committee's work has already led to a much greater understanding of the concept and issues it has addressed, and has clarified how to deal with the concerns and inadequate recognition and protection of Expressions of Folklore. The discussions highlighted the expectation of a number of countries that specific steps should be taken to strengthen protection, including the development of specific new international instruments; others pointed out that the significance of the issues and their complexity, meant that further analysis and clarification was needed before crystallizing formal outcomes; there was a view that more work needed to be done to explore the full potential of existing IP rights and systems to protect Expressions of Folklore.

16. At its Sixth Session of the IGC held in March 2004, the Committee had also decided that the WIPO Secretariat should prepare drafts of an overview of policy objectives and core principles for protection of Expressions of Folklore; and, an outline of the policy options and legal mechanisms for the protection of Expressions of Folklore subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.⁸

17. At its Seventh Session in November 2004, the Committee took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/3; called for further comments on the draft objectives and core principles, including specific suggestions for wording, before February 25, 2005; and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of Expressions of Folklore for consideration by the Committee at its Eighth Session.

18. At its Eighth Session in June 2005,⁹ the Committee considered the draft provisions embodying policy objectives and core principles for the protection of Traditional Cultural Expressions (TCEs)/Expressions of Folklore (EoF). The Annex to the document WIPO/GRTKF/IC/8/4 provided a revised version of the draft provisions for the Committee's further review. The draft had been revised in line with a commentary and review process established by the Committee at its Seventh Session. The draft provisions reflect the essence of the Committee's work on protection of TCEs/EoF since 2001. The provisions are based on the statements, comments and proposals made by Committee participants, and national and regional approaches to protection of TCEs/EoF described and discussed in the Committee's sessions. The latest draft is guided especially

⁸ Report of Sixth Session, WIPO/GRTKF/IC/6/14, para. 66.

⁹ WIPO/GRTKF/IC/8.

by the comments and specific suggestions made at the Committee's Seventh Session and during the commentary and review process since then.

19. The Ninth and Tenth Sessions of WIPO IGC were held in the year 2006.¹⁰ As per the mandate, both meetings were accelerated to work in establishing a concrete outcome with a particular focus on the international dimension on bringing out a legally binding instrument on the subject matter. The draft provisions developed by the previous IGC meetings have been taken further ahead.

20. The Ninth Session stressed the need to formulate concrete measures and identify appropriate mechanisms to establish an international framework for the protection of expressions of folklore. An important outcome of the Session was the launching of a new funding mechanism for indigenous and local communities and the purpose of which was to provide support for representatives of these communities to participate actively in the process of establishing international standards to prevent the misappropriation of expressions of folklore.¹¹

21. In the Eleventh Session (2008), the Member States agreed to undertake a sustained discussion of a list of ten issues related to the protection of Expressions of Folklore.¹² Over the last several sessions the IGC had made substantial progress in exploring the web of complex issues related to the protection, preservation and promotion of TCEs/EoF. This Session had the opportunity to engage in the kind of focused discussion among the Member States to reach a consensus on the agreed list of issues before the IGC. While there was a wide divergence of views in the IGC on issues relating to Expressions of Folklore, the Member States considered the progress could be made with respect to a number of concrete proposals outlined by the IGC. The IGC decided at its Eleventh Session in July 2007 that the WIPO Secretariat should prepare "a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues." It also decided that the revised objectives and principles for TCEs/EoF protection should remain on the table.¹³

22. At its Twelfth Session (2008), the IGC undertook a detailed debate by paying close attention to the interplay between the existing international legal framework and called for extended or enhanced protection of TCEs. It also reviewed the progress made on its substantive agenda items at the current Session, and agreed that to prepare a working document which: (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,

¹⁰ Ninth Session was held from 24-28 April 2006 and Tenth Session was from 30 November to 8 December 2006.

¹¹ WIPO Press Release No. 446 dated 27 April 2006.

¹² WIPO/GRTKF/IC/11/4(A)

¹³ WIPO/GRTKF/IC/11/15 Prov. 2, p. 198.

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; and (e) contain an annex with a matrix corresponding to the items mentioned in sub-paragraphs (a) to (d) above.

III. CONSIDERATION OF ASPECTS OF EXPRESSIONS OF FOLKLORE AT THE THIRTEENTH SESSION OF WIPO IGC

A. Summary of the Deliberations and Decisions adopted at the Thirteenth Session of WIPO IGC (3-12 July 2007)

23. Based on the decisions of the Twelfth IGC Session, in an attempt to focus and intensify work on the protection of TCEs, the IGC drew up proposals to analyze gaps in the protection available in these respective areas. These “gap” analyses were prepared through an open commentary process and reviewed in the Thirteenth Session. The gap analyses contrast the current international legal framework with specific examples of gaps in protection and consideration of how these gaps might best be addressed.¹⁴ The gap analyses were expected to help prioritize issues, identify substantive areas for the Committee to focus upon, and to guide the future work of the Committee towards the expected concrete results.

24. The first draft of the gap analysis on the protection of TCEs was accordingly prepared by the WIPO Secretariat and circulated for comment.¹⁵ As at October 11, 2008, thirteen substantive comments were received from the African Group¹⁶, Australia, Brazil, Ethiopia, the European Community and its Member States, **Japan**, Mexico, Palau, Switzerland, **Thailand**, the United States of America and the Arts Law Centre of Australia and the International Publishers Association (IPA).¹⁷

B. Consideration of the Draft Gap Analysis Document on the Protection of Expressions of Folklore prepared by the WIPO

25. The WIPO Secretariat document (hereafter “WIPO document”) comprises of the revised draft of the gap analysis on the protection of TCEs)/EoF which was submitted for consideration by the Committee at its thirteenth session. The WIPO document contains the following elements:

- (a) obligations, provisions and possibilities that already exist at the international level to provide protection for TCEs;
- (b) gaps that exist at the international level, illustrating those gaps, to the extent possible, with specific examples;

¹⁴ WIPO Press Release dated 22 October 2008.

¹⁵ See the detailed Report prepared by the WIPO Secretariat, WIPO/GRTKF/IC/13/4 (b) Rev.

¹⁶ WIPO/GRTKF/IC/13/9 dated 18 September 2008.

¹⁷ States shown in bold letters are AALCO Member States.

- (c) considerations relevant to determining whether those gaps need to be addressed; and
- (d) options that exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level.

i. Working Definitions and other bases upon which the Gap Analysis is Conducted

Traditional cultural expressions

26. As far as the definition of TCEs/EoF is concerned, the WIPO document noted that there is no internationally settled or accepted definition of a “traditional cultural expression” or “expression of folklore”. There are, however, many definitions in national and regional laws and in international instruments.¹⁸ The draft provisions being discussed by the IGC (the “TCE Draft Provisions”) also contain a draft description of TCEs.¹⁹ 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.

27. The WIPO document has not suggested a single definition or even suggested that a definition is necessary at the international level, a question on which participants in the IGC have different views.

Characteristics of TCEs

28. For the purpose of the analysis, the WIPO document evoked two points and they were: 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.

29. 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,

¹⁸ 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>

¹⁹ WIPO/GRTKF/IC/12/4(c), Article 1.

(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/EoF

30. TCEs/EoF 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.²⁰

31. It is proposed, however, that the WIPO 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. The 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.

32. The above 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).

33. With this background, the WIPO document proposed to focus the analysis on concrete examples falling within the first two categories mentioned below, 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.

34. The third category relating to the method of manufacture of TCEs/EoF 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 was addressed in a coordinated and complementary manner in document WIPO/GRTKF/IC/13/5.

²⁰ Article 1, WIPO/GRTKF/IC/12/4(c).

The meaning of “gaps”

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

36. The WIPO document expressed that 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.

37. However, in order to respond to the IGC’s decision, identifying gaps were undertaken with reference to:

- (i) the forms of protection desired by States and communities; and/or
- (ii) specific technical perceived shortcomings of the existing IP system in relation to TCEs.

38. The desired forms of protection were identified above. The following were suggested as specific, technical limitations of the IP systems most relevant to TCEs/EoF by the WIPO document:

- (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”;
- (b) *Ownership:* Copyright and industrial designs protection requires the identification of a known individual creator or creators. It is difficult, if 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

39. *Conceptual divide:* The suggested focus on the above 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. 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.²¹

40. *Operational divide:* Second, based on the fact-finding work undertaken by WIPO at the outset of its work program in 1998 and 1999²² 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. Numerous

²¹ See WIPO/GRTKF/IC/3/11. page 3; McDonald, p. 45.

²² WIPO, Fact-finding Mission Report; WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/5/3.

suggestions have been made to address these obstacles, including the use of alternative dispute resolution (ADR).²³ .

41. *Shared TCEs*: Third, a significant and recurring problem with regard to the protection of TCEs/EoF 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.

42. *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 and limitations.

ii. The Analysis

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

Literary and artistic productions

43. As regards the Literary and artistic productions, the WIPO document specified that they are typically protected by copyright law, embodied, at international level, in the Berne Convention, 1971, the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1994 and the WIPO Cooperation Treaty (WCT), 1996. Therefore, in respect of *traditional* literary and artistic productions, reference is made to these international instruments.

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

- 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. In general, a relatively low level of creativity is required in order to meet the originality requirement in copyright law. Case law

²³ 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.

from various jurisdictions, such as Australia,²⁴ China²⁵ and elsewhere,²⁶ 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.

- b) The 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 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.
 - d) Recordings of TCEs such as music are protected under “related rights” law.
45. 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

²⁴ M, Payunka, Marika and Others v. Indofurn Pty Ltd 30 IPR 209; Bulun Bulun v R & T Textiles Pty Ltd (1998) 41 IPR 513.

²⁵ Decision of Beijing Higher People’s Court, Case No. 246, 17 December 2003.

²⁶ Lucas-Schloetter, *op. cit.*, cases cited in footnote 238 and on pages 301 to 304.

- 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.
 - 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.”
46. 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. 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

47. Although there was a view that even performers of TCEs were protected under the Rome Convention, 1961, any doubt was removed by the WIPO Performances and Phonograms Treaty (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. The Agreed Statement concerning Article 15 of the WPPT, 1996 also applies to performers.

48. 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.²⁷

49. 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, 1996.²⁸

Designs

50. The WIPO document noted that 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.²⁹ 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.

²⁷ Articles 5 and 6, WPPT, 1996.

²⁸ See WIPO, “Survey on Implementation of Provisions of the WCT and the WPPT”, 2003, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_6.pdf and Lucas-Schloetter, *op. cit.*, pages 304 and 305.

²⁹ WIPO/GRTKF/IC/5/3 and WIPO, Consolidated Analysis.

Secret TCEs

51. 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.³⁰

52. 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”³¹. Protection of confidential information requires neither formalities nor a contractual relationship between the community and the party receiving the information.

Indigenous and traditional names, words and symbols

53. The WIPO document considered two aspects, 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.

54. 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.

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

56. 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.

³⁰ WIPO, Consolidated Analysis.

³¹ Note 10 to the TRIPS Agreement.

B. Gaps which exist at the international level

Literary and artistic productions

57. The following gaps were identified by the WIPO document:³²

- 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
- 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. 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.³³ Disadvantages of this Article include that

³² The fixation requirement is not addressed here as a “gap” because it is not a requirement under international copyright law.

³³ 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

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.³⁴ 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. 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,³⁵ 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.

generally seen as inadequate, they are not discussed further. See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

³⁴ McDonald, I. *op cit.*, p. 44.

³⁵ See especially WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

58. *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/EoF 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.

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

59. The WIPO document sets out some of the consideration and factors that the Member States may take into account in making the decisions. They were:

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

60. 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,³⁶ for example, while others could be addressed at the regional, national and/or local levels.

Legislative, practice, capacity-building

61. 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).

³⁶ See WIPO/GRTKF/IC/12/6 for a range of options an international instrument could take.

The legal and policy environment

62. 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 TCEs 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 Peoples³⁷ addresses the protection of TCEs. A factor could be how best the various policy processes can complement and support each other.

63. The policy environment of WIPO is 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.”

Policy questions

64. The possible protection of TCEs raises a number of complex cultural, economic, social and trade-related questions.

65. 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.³⁸ A key policy challenge is coordinating any new protection for TCEs with existing IP systems.

66. 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.

³⁷ Made available to the Committee as document WIPO/GRTKF/IC/12/INF/6.

³⁸ See WIPO document WIPO/GRTKF/IC/5/3, paras. 22 to 33, and subsequent documents.

Economic, cultural and social objectives

67. 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. The WIPO document 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
- (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

68. To assess the addressing of gaps in relation to the specific technical and legal questions that had been previously identified as necessary to consider to establish new forms of protection for TCEs. They 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?

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

69. It is always an option for the Member 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. 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.

70. Taking this general option into account, it 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

71. 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 513³⁹, the held that in a situation where an individual indigenous artist held copyright in his artwork, he owed a fiduciary duty to his community not to take any steps that harm the community's interest in the artwork under customary law.

Communal moral rights

72. Moral rights (the rights to attribution, integrity and publication) respond to many needs in relation to TCEs and are potentially indefinite in duration. However, they are, like economic rights under copyright, linked to an identifiable author or authors. Communal moral rights could be a very useful avenue to explore further. In 2003, the Australian Government introduced a draft Bill establishing Indigenous Communal Moral Rights (ICMR) to protect the unique cultural interests of Indigenous communities.⁴⁰ The moral rights include the rights of integrity and attribution. ICMR would be a tool for indigenous peoples to prevent unauthorized or derogatory treatment of works drawing on their traditions, customs and beliefs. This proposal is still under discussion in Australia.

Clarification of scope of Article 15.4 of the Berne Convention

73. 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 Committee that an option might be to re-examine Article 15.4 of the Berne Convention and to explore options for its improvement.⁴¹

³⁹ See Janke, Terri, 'Minding Culture – The Protection of Traditional Cultural Expressions', commissioned by WIPO.

⁴⁰ Intervention of Delegation of Australia (WIPO/GRTKF/IC/5/15, para. 131).

⁴¹ Interventions by Delegations of Italy and Brazil at the 12th session of the IGC.

74. 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.

75. 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, 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.

76. 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.⁴² 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 TCEs identifies no longer uses the TCEs or no longer exists as a defined entity, protection for the TCEs would lapse.⁴³ This latter approach is the one embodied in the TCE Draft Provisions before the Committee.

Domaine public payant

77. 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

78. “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.

⁴² See WIPO/GRTKF/IC/5/15, par. 37.

⁴³ Scafidi, S., ‘Intellectual Property and Cultural Products,’ 81 *Boston University Law Review*, p. 793.

79. 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 national copyright authority on behalf of unlocatable copyright owners.⁴⁴ 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.⁴⁵

Resale right

80. 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.⁴⁶ 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.

81. The other issues dealt in the WIPO document were: use of unfair competition principles to combat misappropriation of reputation associated with TCEs (“style”); Derivative works and the defensive protection of literary and artistic productions; Protocols, codes of conduct, contracts and other practical tools; Registers and databases and Collective management.

C. Date and Venue of the Fourteenth Session of IGC

82. The Fourteenth Session of the IGC will be held from 29 June 2009 to 3 July 2009 at Geneva, Switzerland.

⁴⁴ Copyright Act of Canada, Art. 77, available at <http://www.cb-cda.gc.ca/info/act-e.html#rid-33751>

⁴⁵ Report on Digital Preservation, Orphan Works, and Out-of-Print Works, i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, 2007.

⁴⁶ Directive on Resale Rights for the Benefit of the Authors of Original Works of Art, 2001.

IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

83. The WIPO Intergovernmental Committee as an international forum was successful in drafting Provisions for the Protection of Expressions of folklore. Although these provisions are in the draft stage, it presents a comprehensive framework for a future convention. It is also welcoming trend that WIPO General Assembly had decided to renew its mandate by extending the period of IGC in October 2007, to accelerate its work, leaving open the possibility for specific outcomes, including international instruments.

84. In the previous Sessions of the IGC, most of the developing countries were of the view that the approach of the document should focus on defining the framework of an international legally binding instrument as the first priority. Further, it was pointed out that the developed countries, who have taken a more methodical approach to internationalizing the issue of intellectual property which is a special concern to developing countries.

85. In the Thirteenth Session (2008), the Member States were committed to protect the TCEs, but the familiar fault lines emerged quickly. Most of the developing countries favoured internationally binding instrument and whereas, developed countries emphasized the need for further analysis and expressed a preference for non-binding measures, at the national level. Members of the African Group had disheartened by the outcome of the Meeting in view of efforts and proposals they made at this Session.

86. The draft gap analysis document prepared by the WIPO Secretariat gives each Member State a rough description of some of the gaps related to the intellectual property protection of expressions of folklore. Commenting the draft gap analysis, some of the Member States of AALCO observed that in the future Sessions, discussions should focus on the fundamental issues on the List of Issues for constructing a common understanding while referring the gap analysis.

87. At this crucial juncture, the developing countries which are owners of the major resources to be able to agree among themselves on a best possible model. The Member States should also utilize all available options, whether inside or outside the Intellectual Property system, preventive or defensive, national or international, to seek the objective of effective protection of expressions of folklore.

88. In this context, AALCO an intergovernmental legal Organization with representation from almost all major countries from Asia and Africa could be a suitable forum for further discussion and deliberation on the protection of expressions of folklore. This would help in consolidating the position of the Asian-African countries on the substantive aspect of the future international instrument for the protection of folklore. AALCO also feels that a joint seminar/expert meeting on folklore matters with Member States or with any other relevant intergovernmental Organization, in order to find a

common ground to protect the expressions of folklore both at national and international level.

Annexure-A

Table

Draft Gap Analysis on the Protection of Traditional Cultural Expressions

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