



# Negotiations in the WIPO Intergovernmental Committee: What Implications for the Digitization of Cultural Heritage?

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# Outline

- Traditional Knowledge and Traditional Cultural Expressions
  - Value of and threats to
  - Intellectual property: part of the solution or part of the problem?
  - The contribution of IP: actual and potential
  
- The IGC and its new Mandate
  - The draft provisions on traditional cultural expressions and digitization of intangible cultural heritage
  
- Conclusions



Traditional knowledge and traditional cultural expressions/expressions of folklore

- The **value and importance** of traditional knowledge systems and expressions of traditional cultures
  - biodiversity conservation
  - food security
  - environmental management
  - sustainable development
  - primary healthcare
  - cultural identity and social cohesion
  - cultural diversity
  - improvement of socio-economic livelihoods

- **Threats** to their viability and maintenance:
  - rejection of traditions by younger generations: the pull of modernity
  - lack of respect for indigenous knowledge: prejudice against (“unscientific”)
  - acculturation and diffusion: migration, urbanization
  - unauthorized commercial exploitation: challenges posed by new technologies

# Approaches to “protection”

Cultural and  
biological  
heritage

↓  
“Stewardship”

↓  
Safeguarding of intangible  
cultural heritage (UNESCO  
Convention, 2003)

↓  
Respect for and preservation  
and maintenance knowledge,  
innovations and  
practices...relevant for the  
conservation of biodiversity  
(CBD, 1992)

Human rights

↓  
Self-  
determination,  
identity,  
culture

↓  
Rights and  
interests under  
human rights  
conventions and  
declarations (eg.,  
ILO, 1969,  
UNDRIP, 2007)

Intellectual  
property

↓  
“Ownership”

↓  
Economic and  
moral rights  
under IP  
treaties (e.g.,  
Paris  
Convention,  
1883, Berne  
Convention,  
1886)

“Intellectual property” – creations and innovations of the human mind

Intellectual property “protection” – provides creators and innovators with possibility to regulate access to and use of their works if they so wish, and with rights of attribution and integrity

- IP: proprietary and non-proprietary rights
- IP rights do not provide perfect control: limitations and exceptions/ the public domain
- IP “protection” is not the same as “preservation/safeguarding”
- The world of IP is in transformation – e.g., a2k movement

■ Intellectual property and TK/TCEs – a mismatch?

*“A song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory”*



- Yet - protection of TK/TCEs can be achieved through judicious use of IP principles and systems: new applications of core values embedded in IP systems
  
- Focus has been on prevention of acts by third parties beyond the community that are considered acts of misappropriation and misuse
  - How to avoid inappropriate forms of protection that interfere with communities' own values and customary law and protocols
  
  - How to respect other processes and integrate IP's contribution within the holistic preservation, promotion and conservation of TK/TCEs

- To what extent do existing IP systems protect TK and/or TCEs?
- What “gaps” are there?
- Should any gaps be filled?

## Can existing IP systems protect TK and TCEs?

- Copyright and patent protection for **contemporary** creation and innovation based on TK and TCEs
- Copyright for **unpublished works of unknown authors** (Berne, 15.4)
- Related rights protection of **recordings** of cultural expressions and for “**performers** of expressions of folklore” (WIPO Performances and Phonograms Treaty, 1996)
- Databases and compilations of TK and TCEs can be protected
- **Collective trademarks/GIs** can protect TK products (eg., foods, agricultural products, crafts) against passing off
- Protection of **confidential information** for secret TK and TCEs
- Protection against “unfair competition”

- If at all, how should gaps be filled?
  - Adjust/extend existing IP systems?
  - Establish new, specific, distinct IP systems and mechanisms?
    - Private law-making?
    - Publicly-created law?



The WIPO IGC and its new mandate

The draft provisions on TCEs and the  
digitization of ICH

# The Intergovernmental Committee: Origins

- Amendment of the Berne Convention, 1967
- Tunis Model Law on Copyright, 1976
- WIPO-UNESCO Model Provisions, 1982
- WIPO Performances and Phonograms Treaty, 1996
- ----- **establishment of WIPO's "Global Issues" (now TK) Program: 1998** -----
- Roundtable and fact-finding missions: 1998 and 1999
- WIPO-UNESCO regional consultations: 1999
- Sub-regional consultations: 2000 and 2001
- Establishment of the Intergovernmental Committee: 2000

# The Intergovernmental Committee: Key features

- Inclusion and consultation
- Clarity and understanding
  - “Protection” and not “preservation”
  - “Defensive” and “positive” protection
  - “Traditional”
  - “*Sui generis*”
  - “Originality” – between “inspiration” and “misappropriation”
  - The “public domain”
  - “Pre-existing” and “contemporary”: the adaptation right
- Content and context

# New IGC mandate 2010-2011

- text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs
- a clearly defined work program. . . four sessions of the IGC and three inter-sessional working groups, in the 2010-2011 biennium
- build on the existing work of the IGC . . . use all WIPO working documents, including WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8A
- the Committee is requested to submit to the 2011 General Assembly the text of an international legal instrument (or instruments). The General Assembly in 2011 will decide on convening a Diplomatic Conference
- “without prejudice to the work pursued in other fora”
- “bearing in mind the Development Agenda recommendations”



## Draft Provisions on TCEs: Some Key Issues

- Why protect? (objectives)
- Definition of the subject matter ?
- Beneficiaries?
- Which acts should be prevented?
- Exceptions and limitations?
- Fair and equitable benefit-sharing?
- Prior informed consent?
- Duration?
- Formalities?
- Foreign rights holders?

# Which TCEs should be protected?

See article 1

- Protection for expressions which are:
  - in any mode or form (oral or fixed);
  - ‘intellectual creations’ (communal or individual);
  - ‘characteristic’ of a community’s cultural and social identity and heritage; and,
  - maintained, used or developed by a community, or by authorized individuals under customary law and practices
  
- Protected expressions might be ‘pre-existing’ or ‘contemporary’; communally or individually made (but in either case, for communal benefit)

# Who would be the beneficiaries?

See article 2

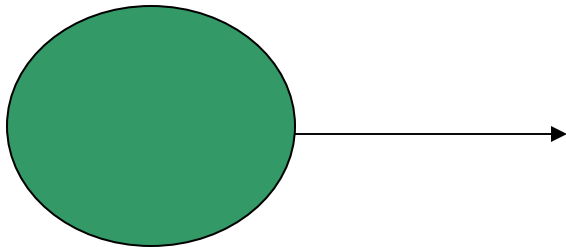
- Beneficiaries would be the peoples and communities:
  - in whom the custody and safeguarding of the TCEs/EoF are entrusted by customary laws; and
  - who maintain, use or develop the TCEs/EoF as being characteristic of their identity and cultural heritage
- Beneficiaries could be an entire nation (see article 5 (b)); rights could be held by the community or the State (see article 4); not individuals directly

# Which acts would be prevented or controlled?

3 “layers” or “levels” of protection

See article 3

1. Cultural expressions of particular cultural/spiritual value (sacred TCEs)



**Notification/registration required**  
**Right to prevent (based on free, prior and informed consent) and moral rights**

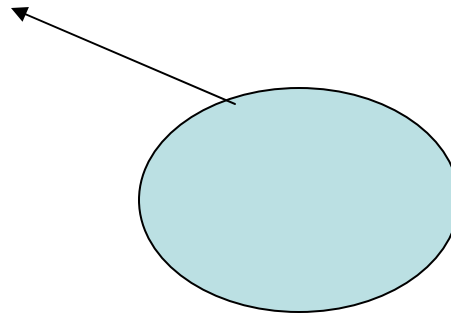
## Right to use, but regulation of use

- acknowledgement of source;
- no distortion, modification or other derogatory action;
- no false or misleading indications of community linkage;
- where gainful intent, equitable remuneration



## 2. Other traditional cultural expressions

### 3. Secret TCEs

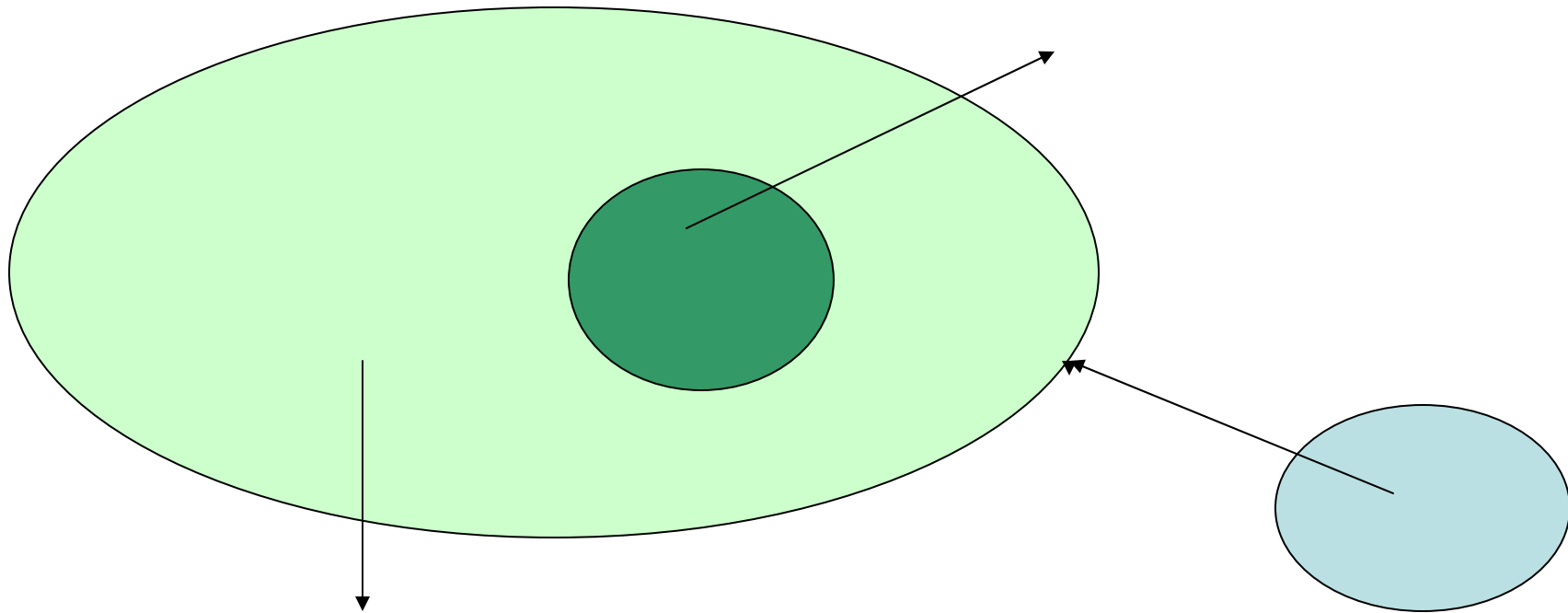


#### Measures to prevent:

- unauthorized disclosure
- subsequent use, and
- obtaining of IP rights

# Summary of draft article 3

1. Cultural expressions of particular cultural/spiritual value



2. Other cultural expressions

3. Secret TCEs

# For how long would a TCE be protected?

See article 6

- For so long as the TCE meets the criteria for protection, i.e.,
  - the TCE is characteristic of a community's cultural and social identity and heritage, and
  - the TCE is maintained, used or developed by the community
- Particular terms for registered TCEs (if any) and secret TCEs



# Which exceptions would apply?

See  
article 5

- Protection should not:
  - restrict/hinder normal use by community but extend only to uses outside of traditional context, whether commercial or not
  - prevent “fair” incidental uses (typical copyright exceptions)
  - *but note, adaptation subject to FPIC*
  - special exception for making of recordings for ICH safeguarding
  - *proposal of ICOM:* [it would be permitted to preserve] “cultural items resulting directly or indirectly from TCEs in museums or other non-profit related cultural institutions. Such preservation should be aimed at conservation, continuation, communication to society, display to the public for educational, research and delight purposes of the world’s natural and cultural heritage, present and future, tangible and intangible. The abovementioned preservation and its goals should always be subject to the rules of fair use”



Conclusion

■ First Intersessional Working Group (TCEs): July 19 to 23, 2010

■ 17<sup>th</sup> session of the IGC: December 6 to 10, 2010

# What resources are available?

- Case-studies
- Laws database and other databases
- Customary law studies and ongoing consultation
- Policy options papers and questionnaires
- Legal analyses
- Guidelines and toolkits
- Hands-on training programs, such as Creative Heritage Cultural Documentation and IP Management program

[www.wipo.int/tk/en](http://www.wipo.int/tk/en)



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END