



COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON THE FEBRUARY 18, 2011, DRAFT ARTICLES ON THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

The World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on February 18, 2011, released draft articles for an international instrument on the protection of traditional cultural expressions (TCE). This latest draft exhibits many of the same problems as earlier drafts. In particular, the range of expression covered by the draft instrument is so broad that if it were adopted and implemented into domestic law, the lawfulness of many of the world's creative works, including novels, plays, poems, operas, paintings, and films, could be called into question. This is because these works are based on stories, legends, and other forms of expression that the instrument could protect without a limitation on term. Additionally, the instrument could lead to conflict within and between traditional communities, to the detriment of cultural development.

Because much of the language of the February 18 draft is still bracketed, providing detailed comments on the draft is difficult. A provision could be innocuous or harmful, depending on the language ultimately adopted. Nonetheless, these comments will attempt to highlight the major structural problems with the draft instrument for libraries, creators, and the public at large.

I. Overbreadth

The overbreadth of protection arises from the interplay of four articles: Article 1 (Subject Matter of Protection); Article 2 (Beneficiaries); Article 3 (Scope of Protection); and Article 6 (Term of Protection).

- **Article 1 – Subject Matter of Protection**

Article 1 of the draft instrument defines “traditional cultural expressions” as the tangible and intangible forms of creativity of the beneficiaries as defined in Article 2. Examples of traditional cultural expressions include: stories, epics, legends, poetry, riddles, words, names, songs, instrumental music, dances, plays, ceremonies, rituals, games, puppet performances, material expressions of art, and sacred places. The following additional examples are in brackets: signs, symbols, sports, handicrafts, and architecture.

Article 1 then provides that protection should extend to any TCE which is “the indicative/characteristic product of a people or community, including an indigenous people or local community and cultural communities or nations as defined in Article 2,” and which is used and developed by that people or community.

The subject matter of protection of the instrument thus appears to go well beyond the subject matter of copyright in that includes intangible, i.e., unfixed, forms of expression. Additionally, it includes typically non-copyrightable subject matter such as words, names, rituals, games, and potentially signs, symbols, and sports. Many societies use similar words, names, signs, and symbols. Symbols, signs, words, and names are the building blocks of communication, and one group of people should not have exclusive rights over their use.¹

¹ Trademark law can provide protection for works, names, signs and symbols to the extent that use by another person in connection to goods or services is likely to cause confusion or to deceive as to the origin, sponsorship, or approval of the goods and services. If a mark is “famous” (if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services), then protection against dilution exists even in the absence of a likelihood of confusion.

Article 1 contains few meaningful limiting principles. The TCE must be “indicative” or “characteristic” of the relevant community, but it is unclear what this means.² Further, the TCE must be “developed” by members of the community, but the standard of originality this imposes is uncertain. Potentially the most important limiting principle is contained in Article 2: which communities’ cultural expression receive protection.

- **Article 2 – Beneficiaries**

Article 2 provides two options for the beneficiaries of protection, both exceedingly broad. Option 1 is “Indigenous Peoples, communities and nations, Local Communities and Cultural Communities.” Option 2 is “Peoples and Communities, [for example] including Indigenous Peoples, Communities, Local Communities, Cultural Communities, and/or Nations, and individual groups and families and minorities.” All these terms are extremely vague, particularly “local communities” and “cultural communities.” Cultural communities could include religious groups. The broad subject matter of protection combined with the wide range of possible beneficiaries indicates that potentially every myth, legend, and folktale ever created is subject to protection, including Greek, Egyptian, and Norse mythology; the Old and New Testaments, the Koran and the Bhagavad Gita; and vampires, elves, witches and werewolves.³

² The bracketed formulation of TCE that is the “unique product of a people” is preferable in that it imposes a higher standard of originality. Anthropologists probably believe that little or no TCE is “the unique product of a people.” Nonetheless, many communities will claim that their TCE is unique, and authors, artists, and performers will find themselves embroiled in litigation for allegedly infringing a group's rights in its TCE.

³ Even limiting the beneficiaries of the treaty to truly indigenous traditional communities could be problematic. Pablo Picasso, for example, based his Cubist paintings on African masks. Paul Gauguin included Tahitian motifs in his paintings. Indeed, an entire art movement – Primitivism – borrowed visual forms from non-Western cultures.

- **Article 3 -- The Scope of Protection**

Article 3 sets forth different forms of protection for TCE. Other than Article A, which addresses TCE kept secret by the beneficiaries, the draft contemplates sweeping economic and moral rights in TCE.

Article A provides that the beneficiaries of secret TCE shall⁴ have the legal means “to prevent any unauthorized fixation, disclosure, use or other exploitation.” Article A actually could form the basis of workable form of protection. Trade secret laws apply without durational limits to commercially valuable secrets, so long as reasonable efforts are made to maintain the secrecy of the information. Accordingly, providing protection to secret TCE may be compatible with existing IP systems as well as principles of free expression.⁵

The instrument then provides three alternatives for additional forms of protection. Alternative 1 contains two articles -- B and C. Article B provides beneficiaries with exclusive rights in their TCE to authorize and prohibit the following: fixation, reproduction, public performance, translation or adaptation, making available or communicating to the public, or distribution. These, of course, are the exclusive economic rights under copyright law. However, as discussed below in greater detail, these rights lack one of the traditional contours of copyright law based on the U.S. Constitution: a limited term.

⁴ Throughout the draft instrument, the word “should” is offered as an alternative to “shall.” The adoption of “should” would convert the instrument’s provisions from mandatory to permissive.

⁵ This assumes that the protection is limited to truly secret TCE – that is, TCE that is completely unknown outside the beneficiary community as of the adoption of the instrument.

With respect to words, signs, names or symbols, a narrower range of rights is granted: any use for commercial purposes, other than traditional uses; acquisition or exercise of intellectual property rights; the offering for sale of articles that are falsely represented as TCE made by the beneficiaries; and any use that disparages, offends, or falsely suggests a connection with the beneficiaries, or brings them into contempt or disrepute. This final clause (with the exception of false suggestion of connection) would be incompatible with the First Amendment and universal norms of free speech.

Article C of Alternative 1 provides moral rights. The beneficiaries shall have the “right to be acknowledged to be the source” of the TCE, and “to object to any distortion, mutilation, or other modification,” including false or misleading indications of endorsement by or linkage with the beneficiaries. Additionally, the beneficiaries can prevent uses that would be prejudicial to their reputation or integrity. While prohibition of false designation of origin is consistent with U.S. norms, the other moral rights provided in Article C are not.

Alternative 2 is far less specific than Alternative 1 with respect to economic rights. It simply provides that the economic interests of the beneficiaries shall (or should) be safeguarded “in a reasonable and balanced manner.” With respect to moral rights, Alternative 2 contains a provision similar Article C in Alternative 1. While Alternative 2 does not mandate a specific set of economic rights, it could lead to the adoption of rights that could cripple the creation of new works.

Alternative 3 states that measures should be provided to: prevent the use or disclosure of secret TCE; require acknowledgement of beneficiaries as the custodians of their TCE; protect against the offensive use of TCE which would be prejudicial to the

reputation of the beneficiaries or the integrity of their TCE; protect against the use of non-authentic TCE in trade that suggests a connection with the beneficiaries; and provide equitable remuneration for fixation, reproduction, public performance, translation or adaptation, and making available or communicating to the public.

Presumably all these rights would vest in TCE that already exist, and could be applied against existing uses.

- **Article 6 – Term of Protection**

Option 1 of Article 6 appears to provide for perpetual protection of TCE. Paragraph 1 states that “protection of traditional cultural expressions should endure as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1...” Paragraph 2 of Article 1 could be read to suggest that the criteria for protection are met only if the TCE is still used or maintained by the relevant community. However, this is not a meaningful limitation, even with respect to ancient civilizations. For example, Greek myths are still told by Greek parents to their children.⁶ To be sure, neither the parents nor the children in Greece believe in the polytheistic system expressed by these myths, and many modern Greeks might not even be biologically related to the ancient Greeks. However, the myths are part of Greek national identity, and are tied to the geography of Greece. Mt. Olympus, after all, is a real mountain in Greece. Although for two thousand years artists around the world have retold the Greek myths in paintings, poems, novels, and films, modern Greeks could claim that the myths have special resonance for them, and insist that the myths are their traditional cultural expression.

⁶ Similarly, Norse mythology is still popular in Scandinavia.

Moreover, a requirement of continued maintenance or use would provide no limitation with respect to ancient sacred texts still in active use, such as the Old and New Testaments, the Koran, and the Bhagavad Gita.

Paragraph 2 of Option 1 explicitly provides that protection against any modification or infringement “done with the aim of causing harm ... to the reputation or image of the community ... shall last indefinitely.” This obviously raises serious First Amendment concerns.

In contrast, Option 2 provides that the protection of economic rights “should be limited in time.” While protection “limited in time” is preferable to perpetual protection, the term adopted could last for centuries.

II. Administration of Rights

As problematic as the breadth of the rights provided by the draft instrument is how those rights would be administered. Under Article 4, the rights would be managed collectively for the beneficiaries by a “competent authority.” The competent authority may grant licenses for the use of the TCE “only after appropriate consultation and with the prior informed consent or approval of the beneficiaries in accordance with the traditional decision-making and governmental processes.” The competent authority may also collect royalties for the use of TCE and distribute them to the beneficiaries.

Article 4 assumes that there is a “traditional decision-making” process with one recognized authority for the community. However, to the extent that a community does not already possess autonomous political authority, it very well might not have a unified power structure recognized as legitimate by all members of the community. The instrument thus could encourage conflict within a community as different factions vie for

legal control over the community's TCE. Alternatively, it could result in a government entity appropriating a community's TCE.

Article 4 does not explain how the instrument would operate across borders. Would the competent authority in one country be able to enforce TCE rights in another country? What happens if members of a community live in two different countries?

Finally, nowhere does the instrument address the problem of two or more different communities asserting rights in the same TCE.⁷ In short, the instrument's structure for administration of rights could encourage conflict between and within communities.

III. Exceptions

Article 5 sets forth exceptions and limitations that are unduly narrow relative to the breadth of the protection required by the instrument.

Paragraph 1 limits the application of the protection of TCE against members of the beneficiary community. However, it appears that this limitation may extend only to "customary uses" within the "traditional or customary context." This suggests that if a community member makes an innovative use of TCE or seeks to popularize it, the competent authority could prevent her from doing so. The instrument, therefore, could stifle creativity within the beneficiary community, perhaps along generational lines. Established artists affiliated with the competent authority could prevent innovative – and competitive – uses by younger artists in the name of protecting traditional culture.

⁷ The Greek government objected to the use of name "Macedonia" by a territory of the former Yugoslavia, arguing that Macedonia refers to a part of Greece. Bolivians believe that the art of the Inca civilization, centered in what is now Peru, derived from the older Tiwanaku civilization, centered in what is now Bolivia. The Koran retells Old Testament stories involving Abraham, Isaac, and Ishmael, but the roles of Isaac and Ishmael are reversed.

Paragraph 2 permits countries to adopt exceptions in compliance with the three-step test of the Berne Convention. However, the Berne Convention requires protection only for the life of the author plus 50 years. This treaty provides perpetual protection for TCE that has already existed for hundreds or thousands of years. Moreover, copyright protection does not apply to signs, symbols, words and names. Alternative paragraph 2 allows countries to adopt appropriate limitations or exceptions, provided that the use of TCE “is compatible with fair practice, acknowledges the indigenous or local community where possible, and is not offensive to the indigenous or local community.” This final clause in essence provides the competent authority with a veto power over a use that otherwise falls within an exception.

Paragraph 3 provides that “to the extent that any act would be permitted under the national/domestic law for works protected by copyright or signs and symbols protected by trademark law, such act shall not be prohibited by the protection of traditional cultural expressions....”⁸ This provision is certainly helpful; it would allow for exceptions such as fair use and the section 108 limitations for libraries and archives. However, as with the incorporation of the Berne three step test in paragraph 2, merely providing the same exceptions as under copyright is insufficient because this treaty sweeps so much more broadly than copyright law. For example, in accordance with their mission to make information accessible to the public, libraries and archives are devoting significant resources to mass digitization. Because of copyright concerns, much of this mass digitization focuses on public domain works. However, the perpetual protection afforded by this treaty would prevent libraries from digital distribution of ancient TCE works in

⁸ This limitation would not be available with respect to secret TCE.

their collections.

Moreover, this provision would not allow the creation of derivative works that did not fall within the fair use privilege. Throughout history, artists have based their creations on pre-existing works originating in other societies.

Paragraph 4(a) would permit the recording and other reproductions of TCE for purposes of their inclusion in an archive for non-commercial cultural heritage safekeeping purposes. While this exception is helpful, it is by no means sufficient for library purposes. This language would not allow the reproduction of the TCE if the library intended to permit scholarly uses of the TCE. It also would not permit the performance or display of the TCE. In essence, the library could keep the preservation copies in a dark archive and permit uses only by members of the beneficiary community.⁹

IV. Conclusion

We understand the importance of traditional cultural expression to the identity of indigenous communities, and their consternation over the commercial exploitation of their TCE by outside entities. However, the draft instrument is not the appropriate solution to this problem. In its current form, the draft instrument would interfere with the cultural life of the global community, pulling out of the public domain material that is incorporated in countless novels, paintings, films, sculptures, operas, and other musical compositions. These works, in turn, would fall under the control of ill-defined (in some

⁹ Libraries and other cultural institutions have policies and practices in place that respect the nature of TCEs and their importance to indigenous peoples. Libraries successfully collaborate with indigenous people to devise ownership and access policies that are mutually acceptable. The instrument could disrupt the close working relationships libraries and indigenous people have developed.

cases, perhaps, impossible to define) “beneficiary communities,” even if these works themselves are in the public domain. Moreover, the instrument would make it impossible for an artist to create new works without trespassing on some community’s TCE rights – including potentially the rights of the artist’s own community. It would also promote conflict within and between communities, leading to uncertainty that would discourage creative efforts. Finally, the treaty would impede libraries’ ability to perform their mission of making information available to the public.

The Library Copyright Alliance consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. More information about LCA is available at www.librarycopyrightalliance.org. For questions about this document, please contact Jonathan Band, Counsel to the Library Copyright Alliance: jband@policybandwidth.com.

March 21, 2011