

CIGI Papers No. 169 – April 2018

Traditional Cultural Expressions Laying Blocks for an International Agreement

Brigitte Vézina



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CIGI Masthead

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About the Author

Brigitte Vézina is a fellow with CIGI's International Law Research Program. At CIGI, she analyzes the key challenges within the ongoing efforts to develop an international system of protection for traditional cultural expressions (TCEs). Her research aims to present ways of protecting TCEs on both the domestic and the international levels.

From 2006 to 2016, Brigitte worked at the World Intellectual Property Organization in Geneva, Switzerland, as a legal officer in the Traditional Knowledge Division, dealing with intellectual property issues related to TCEs. She also worked in the Cultural Enterprise and Copyright Section at the United Nations Educational, Scientific and Cultural Organization in Paris, France, and with the Montreal-based intellectual property law firm, Robic. Brigitte holds an LL.B. from the University of Montreal (2002) and an LL.M. from Georgetown University (2005, with distinction). She has been a member of the Quebec Bar since 2003.

Brigitte's publications include "Cultural Institutions and the Documentation of Indigenous Cultural Heritage: Intellectual Property Issues" in *Indigenous Notions of Ownership and Libraries, Archives and Museums* (De Gruyter, 2016) and "Are they in or are they out? Traditional cultural expressions and the public domain: implications for trade" in *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar, 2012).

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

Traditional cultural expressions (TCEs) may be understood as the ways in which the traditional culture of Indigenous peoples is manifested. Examples of TCEs include traditional songs, arts, ceremonies, handicrafts, stories and dances of Indigenous peoples. These are generally passed down generationally and do not usually have an identifiable author.

TCEs are extremely valuable for the Indigenous peoples who hold them, as TCEs constitute significant expressions of Indigenous peoples' spirituality, world views, socio-economic identity and culture. TCEs are also valuable within the context of the modern economy. Traditional designs, for instance, have increasingly been incorporated into a number of contemporary fashion trends by major brands in their clothing and accessories lines. Similarly, traditional dances, songs and rhythms have been featured in a number of major music recordings and art performances. The economic potential of TCEs thus makes them an important asset to consider.

From the perspective of Indigenous peoples, the categorization of TCEs merely represents an artificial and alien attempt to compartmentalize a singular experience of their cultural heritage, which, for the most part, cannot be done. This categorization is, however, premised on the World Intellectual Property Organization's (WIPO's) structured approach to developing a policy and legal framework for the intellectual property (IP) protection of TCEs. As WIPO has noted, distinguishing TCEs from traditional knowledge is warranted, as the various aspects of traditional knowledge and TCEs, although similar, raise distinct issues that require distinct solutions. It is therefore from this perspective that TCEs are discussed as a specific category in this paper.

WIPO has continued to examine the concept of TCEs as one of its three thematic areas, along with traditional knowledge and genetic resources, within its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). This paper examines the current state of negotiations on matters relating to the protection of TCEs and proposes some solutions to move the process forward.

The paper first offers an historical recap of the international discussions on the protection of TCEs. It then identifies and analyzes the most salient challenges in the current draft articles on TCEs being negotiated within the WIPO IGC, namely, those featuring under the policy objectives, definition of TCEs or subject matter of protection, beneficiaries, scope of protection, and exceptions and limitations. Finally, the paper concludes with some procedural suggestions for moving the TCEs' negotiations forward.

Introduction

The protection of TCEs¹ is the subject of ongoing negotiations within a number of fora. The most prominent of these negotiations are, without contest, those being held within the WIPO IGC in Geneva, Switzerland. This paper explores some of the textual challenges that the international negotiating process at WIPO faces with regard to the IP protection of TCEs. It attempts to identify breaches in the current stalemate and suggests a set of common-denominator compromises (CDCs) as possible solutions for moving forward, toward the adoption of an international legal instrument. The CDCs may not necessarily represent the optimal outcome for the various parties involved in the negotiations, including Indigenous peoples and local communities. However, these CDCs represent minimum standards on which most parties in the IGC process would likely be willing to arrive at an agreement. Many international standards have been built up over time, without having initially been negotiated in the context of an internationally binding legal instrument.² This paper, therefore, sets out to pin down the laying

1 There is currently no agreed definition of TCEs. This paper relies on a WIPO working description found in WIPO, *Glossary: Key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions* [WIPO, *Glossary*], online: <www.wipo.int/tk/en/resources/glossary.html#48>.

2 In the field of culture, for example, the United Nations Educational, Scientific and Cultural Organization (UNESCO), *Universal Declaration on Cultural Diversity*, 2 November 2001, UNESCO Doc 31C/Res 25, Annex 1, online: <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> preceded the more binding UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 3–21 October 2005, UNESCO, Records of the General Conference, 33rd Sess, Paris, vol I at 83, online: <http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

blocks of what could form the basis of a robust international understanding of shared objectives.

Origins of TCEs' Protection

TCEs form a central and dynamic part of the social and spiritual identity of Indigenous communities. Although TCEs have evolved over generations within Indigenous communities, it was only in the 1960s that multilateral discussions on the IP protection of TCEs began. This came at a time when “folklore” was perceived as belonging to everyone, along the paradigms of universal heritage of mankind or common heritage of humanity.³ These paradigms were in vogue in a post-war era concerned with building and maintaining peace, tightening the links between people, ensuring social cohesion and preventing conflicts.⁴ Yet, many Indigenous peoples and local communities, as well as some developing countries, began rejecting the notion that TCEs belonged to humanity, free for anyone to use. Indeed, that notion was fostering the intellectual plunder of some peoples' cultures.⁵ For them, TCEs were a form of IP that deserved protection.

Despite a strong impetus for IP protection, especially from African countries at a meeting in Brazzaville, Republic of the Congo, in 1963, success was, unfortunately, not in the cards. Article 15(4) of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)⁶ was added as part of the 1967 revision with the aim to protect folklore, but the article failed in its implementation.⁷ The Tunis Model Law on Copyright for Developing Countries (1976)⁸ offered a *sui generis*⁹ model of protection within copyright law, which was adopted by some countries, but was never really successfully. In 1985, WIPO and UNESCO published the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action,¹⁰ which were met with limited success. The WIPO Performances and Phonograms Treaty¹¹ (2002) and the Beijing Treaty on Audiovisual Performances¹² (2012), which offer protection for the rights of performers of “expressions of folklore,” attained concrete achievements. However, their application remains far from answering all TCE holders' concerns.

In 2000, WIPO established the IGC as a policy forum for the discussion, among other issues, of IP issues arising within the context of the protection of TCEs. The IGC's founding mandate was, for

- 3 See Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Dordrecht, Netherlands: Martinus Nijhoff, 1998); John E Noyes, “The Common Heritage of Mankind: Past, Present, and Future” (2011) 40 *Denver J Intl L & Pol'y* 447. For its application in the field of cultural heritage, see Janet Blake, “On Defining the Cultural Heritage” (2000) 49:1 *ICLQ* 61; Roger O’Keefe, “World Cultural Heritage: Obligations To The International Community As A Whole?” (2004) 53:1 *ICLQ* 189; Francesco Francioni, “Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity” (2004) 25:4 *Mich J Intl L* 1209.
- 4 For more information on the links between peace, culture and the universal heritage of humanity, see UNESCO, “Culture of Peace and Non-violence”, online: <<http://en.unesco.org/cultureofpeace/>> and the World Heritage Centre, online: <<http://whc.unesco.org/en/>>.
- 5 Thomas Cottier & Marion Panizzon, “Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection” in Keith E Maskus & Jerome H Reichman, eds, *International Public Goods and the Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge, UK: Cambridge University Press, 2005) 570; Anupam Chander & Madhavi Sunder, “The Romance of the Public Domain” (2004) 92 *Cal L Rev* 1340; Carlos M Correa, *Traditional Knowledge and Intellectual Property – Issues and Options Surrounding the Protection of Traditional Knowledge* (Geneva, Switzerland: Quaker United Nations Office, 2001); Graham Dufield & Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham, UK: Edward Elgar, 2008) 335. Refer also to the Bellagio Declaration on the public domain, adopted in 1993, online: <<http://case.edu/affil/sce/BellagioDec.html>>.

- 6 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 1161 UNTS 3, Can TS 1998 No 18 (Paris Act of 24 July 1971 as amended on 28 September 1979) [Berne Convention], online: <www.wipo.int/treaties/en/text.jsp?file_id=283698>.
- 7 Agnes Lucas-Schloetter, “Folklore” in Silke von Lewinski, ed, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (Kluwer Law International, 2008) 268.
- 8 *Tunis Model Law on Copyright*, online: <[ftp://ftp.wipo.int/pub/library/ebooks/historical-ipbooks/TunisModelLawOnCopyright/TunisModelLawOnCopyright.pdf](http://ftp.wipo.int/pub/library/ebooks/historical-ipbooks/TunisModelLawOnCopyright/TunisModelLawOnCopyright.pdf)>.
- 9 *Sui generis* law means “special” or “specific” law that is tailor-made to suit the particular features of the subject matter.
- 10 *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action*, 1982 (1985), online: <www.wipo.int/wipolex/en/details.jsp?id=6714>.
- 11 *Performances and Phonograms Treaty*, 20 December 1996, Can TS 2014 No 21, 36 ILM 76, online: <www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295578>.
- 12 *Beijing Treaty on Audiovisual Performances*, 24 June 2012, (not yet entered into force), online: <www.wipo.int/wipolex/en/details.jsp?id=12213>.

the most part, vague as to the IGC's outcomes.¹³ The IGC held its first session in 2001 and, since its inception, has exerted itself to address the policy concerns of TCE holders. Given the shortcomings of existing IP law to protect TCEs,¹⁴ it was felt necessary to develop a *sui generis* form of protection to fit the unique characteristics of TCEs, borrowing from IP principles and making warranted adaptations.¹⁵ At the seventh session of the IGC, an embryo of an instrument, the "Objectives and Principles,"¹⁶ was issued by the WIPO Secretariat as a basis for further IGC negotiations.

Since the establishment of the IGC, a number of external developments have contributed to understanding the context of the issues being discussed. For example, in 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples,¹⁷ which provides a human rights basis for the recognition of the IP rights of Indigenous peoples. Furthermore, in the same year, WIPO adopted the Development Agenda, which resulted in issues of development forming a key part of WIPO's program and activities, including the IGC Recommendation 18 of the Development Agenda, which addresses TCEs ("folklore").¹⁸

The discussions on TCEs within the IGC progressed in 2009 to text-based negotiations aimed at reaching agreement on an international legal instrument that would ensure the effective protection of TCEs. To facilitate these text-based

negotiations, the WIPO Secretariat organized, in 2010, an intersessional working group (IWG) on TCEs, which established the framework for TCEs' discussions within subsequent sessions.¹⁹ At the IWG, member states developed a new set of provisions based on the existing TCE draft articles. This was arguably the first member state-led legal drafting exercise in the IGC's lifetime.

The IGC is guided by biennial mandates negotiated by the WIPO General Assembly. The IGC's current mandate²⁰ frames its core objective as follows: to undertake text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s), which will ensure the effective protection of traditional knowledge (TK), TCEs and genetic resources. Negotiations on the draft articles continue session after session, year after year. Member states²¹ may, in due course, decide to convene a diplomatic conference for final adoption of an international instrument on TCEs.

Temptation is great to leave this challenging exercise to domestic or regional legislation, a process perhaps closer to the ground and with better anchorage into real-life problems. But one faces a conundrum: should normative development be "bottom up" or "top down"? Where is the best starting point to venture into uncharted waters and run the risk of wrecking against the sharp, shallow reefs?

Noting that the national, regional and international tracks are not necessarily competing and that they might mutually inform each other along the way, the IGC is in the unique position of having a bird's-eye view on an incredible wealth of information based on experiences and practices from various stakeholders all over the world. No other forum can claim to benefit from having a broad overview of the issues and a comprehensive understanding

13 WIPO, "The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore", WIPO Background Brief No 2, online: <www.wipo.int/publications/fr/details.jsp?id=3861&lang=EN> ("The founding mandate of the IGC in 2000 left open what tangible outcomes might arise from its work").

14 Silke von Lewinski, "The Protection of Folklore" (2003–2004) 11 *Cardozo J Intl & Comp L* 747; Christine Haight Farley, "Protecting Folklore: Is Intellectual Property the Answer?" (1997) 30 *Conn L Rev* 1997.

15 Sabine Sand, "Sui Generis Laws for the Protection of Indigenous Expressions of Culture and Traditional Knowledge" (2002–2003) 22 *U Queensland LJ* 188.

16 WIPO, "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles", (2004) WIPO/GRTKF/IC/7/3, online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.pdf>; "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Outline of Policy Options and Legal Mechanisms", (2004) WIPO/GRTKF/IC/7/4, online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_4.pdf>.

17 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 *ILM* 1013 (2007).

18 WIPO, "Development Agenda for WIPO", online: <www.wipo.int/ip-development/en/agenda/>.

19 For the rationale behind the IWGs, see *Decision on Agenda Item 11: Arrangements for the Intersessional Working Group Sessions, Decisions of the Sixteenth Session of the Committee*, WIPO/GRTKF/IC/16/REF-DECISIONS, online: <www.wipo.int/meetings/en/doc_details.jsp?doc_id=133017>.

20 WIPO, *IGC Mandate 2018/2019*, online: <www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf>.

21 There are currently seven informal negotiating, loosely geographical groups in the IGC: the African Group, the Asia and Pacific Group, Group B (developed countries), the Central Asian and East European States Group, the Central European and Baltic States Group, the Group of Latin American and Caribbean Countries, and China. Carolyn Deere Birkbeck, *The World Intellectual Property Organization (WIPO): A Reference Guide* (Cheltenham, UK: Edward Elgar, 2016) at 96.

of shared concerns and expectations. It is also, arguably, the one table at which all stakeholders, including Indigenous community representatives, are invited to sit and express their views.

TCEs' Negotiating Text: Key Challenges

While a number of issues remain unsettled within the negotiations, five key policy areas have proven particularly difficult: policy objectives, the definition of TCEs, the definition of beneficiaries, the scope of protection, and exceptions and limitations.

This paper discusses these five policy areas based on the latest version of the draft articles on TCEs.²² The analysis is not exhaustive and does not delve into the minute details of each article. Instead, the paper casts a spotlight on the critical areas of divergence within the articles implicated by these five policy areas. The goal is to highlight the options that could generate the greatest support of parties toward a possible adoption of an international legal instrument.

Policy Objectives: Has the IGC Lost Its Sense of Purpose?

TCEs, as creative assets, have economic, social and cultural importance. Economically, they are a source of livelihood — they have potential to contribute to community enterprises, job creation and income generation; one could think of tradition-based handicraft, cultural tourism, music and entertainment, to name only a few. Culturally and socially, TCEs are elements of the living heritage of a community, of its social and cultural identity (pride and sense of belonging), and of its lifestyle.

For some time, TCEs were considered part of the heritage of humankind, in other words, the public domain.²³ Over the decades, this vision was criticized for encouraging rampant uses that went against the rights and interests of TCE holders, accentuated by new technologies that allowed even greater access and rendered TCEs increasingly vulnerable to unwanted uses. In many cases, Indigenous peoples and local communities suffer from their TCEs being characterized as “belonging to everyone” and feel despoiled, dispossessed of their culture.

There is no clear definition of what would constitute an unauthorized, unwanted, illicit, harmful or wrong use of TCEs, but instances of such uses range from use without free, prior and informed consent; failure to acknowledge the source; unauthorized access to sacred and secret material; derogative use; failure to share the benefits; and TCEs becoming the subject of IP rights held by third parties. Concerns about TCE misuse or misappropriation can be linked to the discussions around cultural appropriation. Worries that TCEs are not being used *authentically* by third parties who are not part of the culture, or without knowledge of the culture that had originated them, may lead to misrepresentation

22 WIPO, “The Protection of Traditional Cultural Expressions: Draft Articles” (16 June 2017) WIPO/GTRKF/IC/34/8, online: <www.wipo.int/meetings/en/doc_details.jsp?doc_id=375036> [WIPO, “The Protection”].

23 For a discussion of the term “public domain” in relation to TK and TCEs, see WIPO, “Note on the Meanings of the Term ‘Public Domain’ in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore” (24 November 2010) WIPO/GTRKF/IC/17/INF/8, online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_8.pdf>.

that can be harmful, if not done with the engagement or involvement of the community.

Well-known examples of such misuse or misappropriation include the *Deep Forest*,²⁴ Aboriginal carpets,²⁵ Lego Maori,²⁶ Navajo underwear²⁷ and Redskins trademark²⁸ cases and dozens of others.²⁹ The “Return to Innocence” case is quite representative. The 1993 song titled “Return to Innocence” by the German group Enigma featured the recording of a traditional song performed by members of a community from Taiwan. The performance had been collected and recorded for archival purposes. Enigma had accessed the recording and obtained permission from the record company to use a sample of the voices in order to create the song “Return to Innocence,” interweaving the voices with layers of electronic sounds. But Enigma had not sought permission from the performers themselves. The performers launched a series of lawsuits for unauthorized use of their performance, claiming the neighbouring right of performers in their performances. The case was settled out of court in 1999 for an undisclosed

amount, compelling Enigma to acknowledge the performers’ contribution to the song.³⁰

Existing IP law might be used to prevent some illegal uses, but it has many shortcomings with regard to TCEs, all of which are too well documented to be recounted here.³¹ Most existing IP laws have emerged in the context of Western cultures with specific conceptions of creation incentives and rewards, for the benefit of creators and society as a whole. These legal regimes often do not match the vision that TCE holders have of their own cultures and, hence, fail to provide adequate protection.³²

The same could be said about other non-IP measures, which exist to foster and support cultural production, such as governmental programs (subsidies) offered for film production, museum funds and artist grants. Yet, unlike cultural productions from relatively dominant societies, TCEs are habitually the creations of Indigenous peoples and local communities living on the margins of dominant societies — often minorities on their country’s territory — who often do not benefit from the main sources of non-IP cultural support to make their cultural expressions prosper. In that framework, the balance is skewed against Indigenous peoples and local communities who have not participated in the main cultural production framework and whose TCEs are being used by others, without a compensation mechanism to encourage and reward creativity and acknowledge their contribution to society. Hence the need to restore the balance: new *sui generis* IP protection might come to offer the support that is otherwise lacking and to fill in the gaps where existing law fails to offer protection.

24 The case of *Deep Forest* illustrates the risks of misappropriation of musical TCEs. “In 1969 or 1970, Swiss-French ethnomusicologist Hugo Zemp made a recording in Malaita, Solomon Islands, of a lullaby chant called ‘Rorogwela’ performed by a woman named Afunakwa. As the maker of the sound recording, Zemp owned the copyright therein. He deposited his recording with a UNESCO ethnomusicology archive. The recording was copied from the UNESCO catalogue without permission from Zemp, and the chant then re-mixed, fused with ‘techno-house’ dance rhythms and produced as the successful song ‘Sweet Lullaby’ on the 1992 CD *Deep Forest*. Large profits were made from sales of the record, with no returns to the Malaita community and wrong attribution (the track was described by its publisher as ‘a rare and unusual mix of ambient modern music and the songs of the Pygmies of the Central African Rain Forest.’” Brigitte Vézina, “Are they in or are they out? Traditional cultural expressions and the public domain: implications for trade” in Christophe B Graber, Karolina Kuprecht & Jessica C Lai, eds, *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham, UK: Edward Elgar, 2012) at 196–220.

25 *M*, Payunka, Marika & Others v Indofurn Pty Ltd* (1994), 30 IPR 209.

26 Andrew Osborn, “Maoris Win Lego Battle”, *The Guardian* (31 October 2001), online: <www.theguardian.com/world/2001/oct/31/andrewosborn>.

27 Noel Lyn Smith, “Navajo Nation, Urban Outfitters settle designs suit”, *USA Today* (18 November 2016), online: <www.usatoday.com/story/money/nation-now/2016/11/18/navajo-nation-urban-outfitters-settle/94061622/>.

28 Wikipedia, “Washington Redskins trademark dispute”, online: <https://en.wikipedia.org/wiki/Washington_Redskins_trademark_dispute>.

29 Terri Janke, *Minding Cultures: Case Studies on Intellectual Property* (Geneva, Switzerland: WIPO, 2003), online: <www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf>.

30 For a full discussion of this case, see Brigitte Vézina, “Cultural Institutions and the Documentation of Indigenous Cultural Heritage: Intellectual Property Issues” in Camille Callison, Lorie Roy & Gretchen Alice LeCheminant, eds, *Indigenous Notions of Ownership and Libraries, Archives and Museums* (Berlin/Munich, Germany: De Gruyter Saur, 2016).

31 WIPO, “The Protection of Traditional Cultural Expressions: Draft Gap Analysis” (2008), online: <www.wipo.int/tk/en/igc/gap-analysis.html> does a marvelous job of pointing out the shortcomings of copyright law when it comes to protecting TCEs and identifying mismatches, such as the concept of originality, authorship, ownership, duration and so on.

32 However, “copyright law...has been an important, if not dominant, model for promoting and protecting [cultural] expression....Moreover, it can no longer be said that copyright is simply a Western model.” R Shih Ray Ku, “Promoting Diverse Cultural Expression: Lessons from the U.S. Copyright Wars” (2007) 2:2 Asian J WTO & Intl Health L & Pol’y 369 at 371.

In 2017, at IGC 34, the chair, Ian Goss, invited member states to “consider and reflect on the type of harm(s) that an IP instrument on TCEs would seek to address.”³³ That exercise would help determine the objectives of the instrument, which “are fundamental to the development of the operative text of any instrument as they detail the purpose and intent of the instrument.”³⁴

Article 1 of the draft articles tries to give shape to the objectives that the instrument should achieve. It is made up of four alternatives varying in their level of detail and their focus on IP issues. Alt 1 is detailed, listing the acts that should be prevented, but limits its commitment to “provide the means to,” so it is not too prescriptive on member parties. Alt 2 is more prescriptive, but otherwise similar in its level of detail. Alt 3 is more general and is the so-called “positive approach,” calling for “appropriate” use of TCEs within the IP system. Finally, Alt 4 is less detailed and summarizes the needs to prevent some acts, to protect TCEs and to recognize the rights of Indigenous peoples and local communities.

Some delegations wish to emphasize the “perspective of indigenous peoples, local communities, and others who might be regarded as custodians of TCEs,”³⁵ while others seek to balance “the interests of those beneficiaries with the protection of the public domain and artistic freedom.”³⁶ It would seem that the second approach is more likely to be accepted as a CDC, as the IP system relies on the quintessential ingredient of balance.

Whatever the alternative, the current policy objectives are too far-reaching and ambitious; those alternatives entering too deep a layer of detail run the risk of paradoxically narrowing the breadth of the instrument. There should be only one policy objective, naturally flowing from an appositely drafted provision on the scope of protection. It should be realistic, achievable and circumscribed, yet remain general enough so as to receive international application. It should be simple, clear, efficient and have a clear IP angle.³⁷ An objective

needs to be unequivocal because it determines how the instrument will be implemented and applied.

There are thus two alternative (not cumulative) CDC approaches, based on either a positive or a negative formulation:

- the objective of this instrument is to prevent/deter the offensive use of TCEs; or
- the objective of this instrument is to ensure/encourage the respectful use of TCEs.

The options between “ensure/encourage” and “prevent/deter” are to do with how binding the obligations of state parties should be in implementing the instrument. This paper would favour a more binding formulation, yet the less-binding option would most probably constitute the CDC.

What Should Be the Subject Matter: The Elusive Quest to Define TCEs

The current draft definition of TCEs in article 2 “Use of Terms” provides two alternatives. The first alternative is very detailed, listing examples and developing many characteristics, and is closed (“means any form”). The second alternative is open (“comprise”), broader, but perhaps too vague, for that matter.

Article 2 needs to be read in conjunction with article 3 on subject matter. The fact that there are two provisions dealing with one issue is inflating the risk of conflict in the interpretation, and the IGC should concentrate its efforts on streamlining the definitions to obtain a single one. There are many redundancies, but trying to merge the two articles is a titanic task, so perhaps it is wiser to take a step back and contemplate a *tabula rasa*.

The reason for there being two provisions on definitions is that some members (mostly

33 WIPO, “Chair’s Information Note on TCEs” (1 June 2017) WIPO/GRTKF/IC/34/REF/INFORMATION_NOTE, online: <www.wipo.int/meetings/en/doc_details.jsp?doc_id=373916>.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

developed, Group B countries³⁸) believe it is important to distinguish TCEs in general from those that would benefit from protection. In other words, not all TCEs are worthy of protection, and criteria of eligibility are there to sort the wheat from the chaff. The current text has the word “protected” preceding every occurrence of “TCEs,” at the request of the delegation of the United States, emphasizing the desire to make that distinction.

Along those lines, there should be a neutral definition, akin to that of a “work” under copyright law, in an article on definitions (article 2), and then a provision that would set eligibility criteria for TCEs to benefit from protection (akin to originality in copyright law, which is, by contrast, in neither the Berne Convention³⁹ nor the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property⁴⁰ [TRIPS Agreement]).

Some conditions do need to be met for TCEs to be protected. This provides the boundaries of subject matter and ensures clarity in the application of the instrument. Yet, the eligibility criteria are perhaps superfluous, as the definition, read with the provision on the scope of protection, could define what would be protected.

Be that as it may, there are some good policy reasons not to protect objects that do not need protection. To mention only a few examples, there may be cases where communities do not wish to have their TCEs protected because they no longer associate with them or because they have ceased to hold, maintain or transmit them to the next generations, or for any other reason. The risk of double protection is also a factor to take into account, especially in the case of “new” TCEs, which could potentially benefit from copyright protection.

To better understand the need for setting limits on the subject matter of protection, the paper will take a moment to ponder the time criterion in article 3, Alt 2 (d). This is a source of great confusion in the IGC, as it is often conflated with the duration of protection. The policy concern

behind this criterion is the potential overlap between TCEs and copyrightable works: only TCEs that are truly intergenerational would be protectable, excluding TCEs that might have “sprung overnight” and would likely be candidates for copyright protection. The underlying policy objective is clear: protection should not be afforded to “new” TCEs. So any *sui generis* form of protection should cater only to truly transmitted expressions. In fact, this time requirement is no stranger in the field of cultural heritage. Indeed, the definition of antiques in cultural property law is a helpful comparison. Antiques need to be at least 100 years old to qualify as such.⁴¹ Similarly, under the International Convention for the Protection of New Varieties of Plants,⁴² the trait of a new variety of plant must remain true to type after repeated cycles of propagation.⁴³ That would mean one would have to demonstrate that a TCE has been repeated for generations.

However, issues of evidence and burden of proof would be daunting for TCE holders who would have to demonstrate that a TCE has been passed down through at least five generations or 50 years, as the text currently requires. Because many TCEs are intangible, traveling back through time to set a date of creation would be close to impossible. This issue deserves to be analyzed in more detail, but the limited coverage of this paper does not allow such an exercise here.

A solution could be that there are no separate criteria of eligibility. As mentioned, the Berne Convention and the TRIPS Agreement do not expressly provide for the originality requirement, which is the *sine qua non* of any copyright protection for works, almost anywhere in the world. This matter is largely determined at the national level. This could be the noble route taken by the IGC to elegantly leap over this hurdle.

38 See WIPO, “The Protection”, *supra* note 22, for the repartition of member states into groups within the IGC.

39 The Berne Convention, *supra* note 6, also uses the phrase “protected works.”

40 Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 15 April 1994, 869 UNTS 299, 33 ILM 81.

41 See e.g. the definition of “antique” in the Merriam-Webster Dictionary: “a work of art, piece of furniture, or decorative object made at an earlier period and according to various customs laws at least 100 years ago” [emphasis added], online: <www.merriam-webster.com/dictionary/antique>.

42 International Convention for the Protection of New Varieties of Plants, 2 December 1961, [2000] ATS 6, 33 UST 2703, 815 UNTS 89 (entered into force 10 August 1968), online: <www.upov.int/upovlex/en/conventions/1991/w_up910_.html#_1>.

43 The author would like to thank Patricia Covarrubia for pointing this out in a forum discussion (unpublished).

The two main aspects that have to form part of the definition of TCEs are the transmission from generation to generation and the link with a community as a whole that identifies with and values the TCEs and their relationship therewith.⁴⁴ Other criteria could be refined in directives or guidelines or could be left to be interpreted at the implementation level.

A useful CDC suggestion could be as follows: “The subject matter of this instrument is traditional cultural expressions that are

- a. created;
- b. held;
- c. transmitted;
- d. maintained in a collective context through the generations; and
- e. directly linked with their holders who integrally identify with them.

Traditional cultural expressions are any forms of creative, literary or artistic expression that embody, manifest or express the collective traditional cultural heritage of their holders.”

Who Are the Beneficiaries: Protecting People Who Hold TCEs

The third challenge under discussion is determining who would benefit from TCEs’ protection. Going back to the objectives, it is crucial to determine whether the instrument aims to protect TCEs, and whoever their holders might be, or aims to protect Indigenous peoples and local communities and their cultural creations. It seems the debate has been leaning on the side of the former approach, yet beneficiaries still need to be a well-circumscribed group.

44 This will dispel the uncertainties around “publicly available,” “closely held” or “widely available” in article 5 (for example, in paragraph 5.2 of Alt 1 and Alt 2) and make sure the link with the holders is tight.

As Ambassador Wayne McCook, former chair of the IGC, stated, “The term ‘beneficiaries’ refers to the persons (legal or natural) who would be identified as the rights holders under national or domestic legislation implementing an international instrument as might be agreed upon by the IGC.”⁴⁵

In the current text, the two views are clear: beneficiaries could only be Indigenous peoples and local communities, or Indigenous peoples and local communities together with other beneficiaries. One might reluctantly concede that Indigenous peoples and local communities are too limited a group and that some countries wish to expand the category of beneficiaries to other possible holders in cases where there are no “specific segments of the population that can be identified as indigenous peoples or local communities.”⁴⁶ Some IGC members do not hide their intention to see the state as a beneficiary. It would seem, however, that this is not the policy intent of the instrument; TCE protection is not a bounty for the government but a means for disadvantaged peoples to reclaim their culture. Therefore, while there could be some policy space to include other beneficiaries beyond Indigenous peoples and local communities, the IGC has to manage the risk that “protection could be extended too widely to any kind of cultural expression,”⁴⁷ including those not held by persons or groups of persons.

Alt 4 of the draft might stand a chance to gain consensus and could be the CDC because many member states are adamant to include other beneficiaries who are holders of TCEs. The main beneficiaries are clearly Indigenous peoples, and they would feature prominently in the provision. The definition of beneficiaries should be open and flexible to leave policy space at the national level. It could be refined in operational directives or guidelines, as in the case of the UNESCO 2003 Convention.⁴⁸

45 Wayne McCook, “Traditional Knowledge and Traditional Cultural Expressions: Certain Suggested Cross-Cutting Issues” (2014) at para 34, online: <www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_27_issues.pdf>.

46 *Ibid* at para 40

47 *Ibid* at para 39.

48 Rieks Smeets, “On the Preparation and Adoption of the UNESCO 2003 and 2005 Conventions” (Seminar on Intellectual Property and Traditional Cultural Expressions delivered at WIPO, Geneva, 8–9 June 2017), online: <www.wipo.int/edocs/mdocs/tk/en/wipo_ip_tk_ge_17/wipo_ip_tk_ge_17_presentation_20smeets.pdf>.

A CDC could thus be as follows: “the beneficiaries of this instrument are Indigenous peoples, as well as local communities and other beneficiaries, as may be determined by national law, who hold, express, create, maintain, use and develop protected traditional cultural expressions.” However, this CDC would need to be carefully drafted to avoid providing scope for countries to decide that Indigenous peoples are not the holders of their TCEs.

What Should Be the Scope of Protection: A Primer on the Meaning of “Protection”

The fourth challenge is to delimit the scope of protection: a narrow scope of protection would mean an impractically watered-down instrument, while too broad a scope would dissolve the instrument’s purpose and equally cause it to be inapplicable. This paper does not delve into the complexities of the various alternatives in the articles. It strongly advocates for a pure and streamlined provision on scope of protection.

Protection, Not Safeguarding

First, the IGC is not trying to duplicate the work being carried out at UNESCO for the preservation, conservation or safeguarding of cultural heritage, which consists in efforts to prevent its loss, degradation, disappearance or fall into oblivion. Indeed, the protection in the IP sense is far removed from the efforts led under the UNESCO 1972 World Heritage Convention or the 2003 or 2005 conventions, which have distinctly different objectives when it comes to protecting cultural heritage, whether tangible or intangible.⁴⁹

Currently, the draft articles make several references to the term “safeguarding” as an alternative to

the term “protection.” Perhaps this term is used to represent a lesser form of protection. However, this is quite unfortunate, as it is a source of much confusion with the same term as used by UNESCO. Hence, for clarity purposes, efforts should be made to dispel the misunderstandings, and the term should be deleted and replaced by another term, where necessary. Specifically, aims related to safeguarding⁵⁰ or preservation⁵¹ that fall within the purview of UNESCO should be taken out of the policy objectives and, if retained, placed in the preamble.

IP protection of TCEs may have three distinct objectives. The first would be to prevent uses by third parties: this includes rights to control access and use outside of the community and rights to avoid unauthorized uses (reproduction and adaptation); degrading use; misleading use; commercial use; use without attribution or acknowledgement; use without remuneration (royalties and benefit sharing); and use of sacred or secret TCEs. The second would be to promote economic development: this includes rights to allow rights holders to protect, promote and exploit TCEs commercially, where desired. The third objective would be to prevent third parties from illicitly acquiring or exercising rights (defensive protection).

Misuse or Misappropriation?

Second, the terms “misuse” and “misappropriation” are used in the context of the IP protection of TCEs, often as an inseparable pair. Indeed, both terms “may be used in a colloquial or non-technical manner, loosely embracing the various prohibited acts that are more specifically detailed in a *sui generis* instrument.”⁵² Yet both terms receive specific, technical definitions in IP law.

Misappropriation entails the wrongful or dishonest use or borrowing of someone’s property and is often used to found actions in cases where no property rights as such have been infringed. Misappropriation may refer to wrongful borrowing or to the fraudulent appropriation of funds or property entrusted to someone’s care but actually

49 Francesco Francioni, ed, *The 1972 World Heritage Convention: A Commentary* (New York, NY: Oxford University Press, 2008); Noriko Aikawa, “An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage” (2004) 56 *Museum Intl* 137.

50 Thomas M Schmitt, “The UNESCO Concept of Safeguarding Intangible Cultural Heritage: Its Background and Marrakchi Roots” (2008) 14:2 *Intl J Heritage Stud* 95.

51 Francioni, *supra* note 49.

52 McCook, *supra* note 45.

owned by someone else.⁵³ Misuse refers to improper or excessive use, or to acts that change the inherent purpose or function of something.⁵⁴

In the IGC context, it seems these two basic terms are so nebulous that member states do not venture into trying to define them and instead use them as vague placeholders to avoid conflict. Still, the terms' ambiguity is harming the process because without clarity, it is unlikely that there will be consensus. Any term, whether those two or others,⁵⁵ would have to be precisely and technically defined in the context of the draft articles for the sake of clarity and legal certainty.

A Streamlined Provision on Scope of Protection

Third, the negotiated text should simply give states maximum flexibility to determine the scope of protection, with a possibility to fine-tune the provision at the national level. A CDC for the scope of protection could be as follows: "beneficiaries have the right to have their TCEs used in a respectful/non-offensive manner." Respectful or non-offensive use would incorporate the following elements, and be drafted as part of the operative text, or in a directive or guideline: first, acknowledge/attribute the holder, where known; second, not misrepresent, disparage, mislead or use in a derogatory manner; third, not cause offence to the holder; and, fourth, respect the sacred or secret character of the TCE and refrain from disclosing secret TCEs, where the user knew or had reasonable grounds to know of that character and acted deliberately and in bad faith. Respectful or non-offensive use would also include the right to prevent the acquisition or exercise of an IP right over a TCE ("defensive" protection).

53 WIPO, *Glossary*, *supra* note 1 at "Misappropriation", online: <www.wipo.int/tk/en/resources/glossary.html#33>.

54 *Ibid* at "Misuse", online: <www.wipo.int/tk/en/resources/glossary.html#34>.

55 The terms "respectful use" or "offensive use" are perhaps preferable, for reasons detailed below.

Exceptions and Limitations: A Balancing Act

The fifth and last key challenge is the determination of exceptions and limitations, the necessary counterpart to the scope of protection. Exceptions and limitations are quite common in IP law regimes, as they help define the scope and ensure that the system balances the rights of holders with the interests of users and the general public. Under the draft instrument, users and society at large need to have legal certainty and to have a practical environment to guarantee the respect of Indigenous peoples and local communities' rights. Exceptions and limitations are, in a sense, an intrinsic "checks and balances" mechanism.

Given that this paper has put forward a narrow scope of protection, the necessity of exceptions and limitations is debatable. The scope of protection actually takes elements from existing exceptions and limitations, so it would be incongruous to have the same requirements in both the scope and the exceptions.

For example, the specific exceptions and limitations provided in the current text for cultural institutions in the interests of heritage preservation are perhaps not necessary, given the narrow scope of protection, which would, in fact, allow these activities in the first place. The IGC process strives not to undermine the essential preservation efforts of cultural institutions and to strike the right balance between IP protection and preservation and safeguarding. However, a balance should also be struck between those activities and the interests of TCE holders. To manage these possible tensions, directives could be drafted to avoid colonialist attitudes toward collections of TCEs and to advocate for cooperation among institutions and communities. Likewise, there might not be a need for an exception for inspiration or borrowing, as those uses would anyway be allowed, so long as they are not harmful or offensive and are done in a respectful way. Nevertheless, some policy space could be carved for countries to develop exceptions to fit their own specific circumstances and in the public interest.

A CDC could be as follows: "member states may adopt justifiable exceptions and limitations

necessary to protect the public interest where it is disproportionately and unreasonably prejudiced, provided such exceptions and limitations are limited to certain special cases, do not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries and do not unreasonably prejudice the legitimate interests of beneficiaries nor unduly prejudice the implementation of this instrument.”

The Future of TCEs’ Negotiations

This paper has tried to bring some clarity, but may admittedly fall short of providing the key to solving this giant puzzle. The author fully acknowledges that these textual proposals are just that — proposals — and that they do not claim to be the miracle solution that will unlock the IGC’s strenuous discussions. Indeed, no paper can claim to offer the solution to a negotiation struggle of such magnitude. This paper has, however, hopefully plowed some furrows to plant the seeds of a future instrument.

The cultures of Indigenous peoples and local communities often do not benefit from the same support as do “dominant” cultures, whether through the IP system or outside of that system. An international instrument would have an important role to play in restoring the balance within the IP system, which underlies the IGC’s drive.

It is true that some of the CDCs proposed do not necessarily address the key concerns of the *demandeurs* in the way that they seek to restore this balance. Yet, actually arriving at a CDC outcome within the IGC could be prioritized above securing the “perfect” outcome that the *demandeurs* may have set out to achieve. In this sense, a CDC outcome could be viewed as a first step that may pave the way for a balanced TCE-protection system around the globe.

Beyond mere textual suggestions, achieving a CDC outcome will also require important procedural adjustments within the IGC. Three recommendations are provided below.

TCEs are closely linked to genetic resources and TK within the IGC process, and, as such, may have become the victim of strategic power games among negotiators. Certainly, delinking the issue of TCEs in the negotiation process from the other two themes would be a useful step forward.

Despite the IGC having existed for more than 17 years, disagreement on fundamental issues, such as definitions, the scope of protection and objectives of the instrument, remains a challenge. In other processes, such as the UNESCO 2003 and 2005 conventions, these foundational issues “had been largely agreed upon beforehand, for 2003 in lower level meetings; for 2005 through the 2001 Declaration on Cultural Diversity.”⁵⁶ The IGC should convene lower-level meetings of experts and Indigenous-peoples representatives to reach agreement on basic conceptual issues before holding high-level diplomatic talks. Real negotiations need to take place in small expert groups, whose reports to member states would be transparent and would focus on the discussions’ positive outcomes.⁵⁷ Discussions based on facts and experiences at the technical, expert and informal levels are essential to address the problem.⁵⁸

Another procedural recommendation would involve a “champion” country or organization representing Indigenous peoples (like the role that the World Blind Union played in the negotiations leading to the adoption of the Marrakesh Treaty⁵⁹), stepping up to take the lead. This champion would need to have enough capacity, both technical and financial, to organize meetings and mobilize support, with the active support of the WIPO Secretariat, “in close contact with supportive and dissenting delegations, and with meeting reports concentrating on the more successful debates and their outcomes.”⁶⁰

56 Smeets, *supra* note 48.

57 *Ibid*; Daniel R Pinto, “Towards a consensus [at][on] the IGC: A view from Brazil ” (Seminar delivered at the WIPO IGC, 9 June 2017), online: <www.wipo.int/edocs/mdocs/tk/en/wipo_ipitk_ge_17/wipo_ipitk_ge_17_presentation_18pinto.pdf>.

58 Marco D’Alessandro, “What can the IGC learn from the Nagoya Protocol?”, online: <www.wipo.int/edocs/mdocs/tk/en/wipo_ipitk_ge_17/wipo_ipitk_ge_17_presentation_16d_alessandro.pdf>.

59 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, 27 June 2013 (entered into force 30 September 2016), online: <www.wipo.int/treaties/en/ip/marrakesh/>.

60 Smeets, *supra* note 48.

To conclude, holding technical, expert discussions to resolve fundamental issues might be the first block in laying the foundation for the IP protection of TCEs around the world.

Author's Note

Much of the information in this paper independently originates from the author's work while at WIPO. However, this paper does not represent WIPO's views or any of its member states. All errors are the author's own. This paper is not intended as a scholarly article; rather, it presents some of the author's insights as an insider practitioner, based on her work experience at WIPO. Brigitte is grateful to Bassem Awad, Oluwatobiloba Moody, Matthias Rieger and anonymous peer reviewers for their thoughtful comments on earlier drafts of this paper.

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