



Chapter 1

Discourse and Trends on Intellectual Property Rights
in the Field of Safeguarding ICH
at Local and International Levels

Examination of the Discourse Regarding the Protection of Traditional Cultural Expressions Based on the WIPO Debate

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I. Significance of the Protection of TCEs

Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF),¹⁾ which belong to local communities or indigenous people within a nation, have great significance in that they are not only the source of cultural contents, but also lead in the creation and development of traditional culture. However, not enough efforts have actually been made to protect TCEs at an international level.

Although more and more TCEs have been reproduced into various forms and made profits, the benefits have not been shared with the community, indigenous people or those who contributed to the preservation and development of TCEs.

Another important issue to be raised regarding said topic is that TCEs are being distorted, modified and altered as they are used. Distortion,

1_ In fact, as the meaning of folklore in the dictionary varies and some communities had reservations toward the negative connotation of the term folklore, it is agreed that, apart from the title for IGC, 'Traditional Cultural Expressions' (TCEs) should be used instead. However, terms like TCEs, 'Expressions of Folklore' (EoF) or 'folklore' are also used in the meetings of the Intergovernmental Committee of WIPO.

modification and alteration of TCEs that neglect the original objectives and meaning not only devalue the creation of TCEs, but also defame the cultural and social identity of nations, local communities or indigenous peoples, thus provoking a serious international problem. Therefore, it is necessary to provide a legal system in order to protect TCEs internationally and prevent such misuse.

Many countries, in particular developing countries, acknowledge the fact that the most appropriate means of preserving and developing traditional cultural heritage lies at the heart of global protection, thus establishing a relevant legal framework or initiating discussions to create such a framework. Reflecting on such international trends, countries are launching diverse and continuous discussions through international organisations to provide protection to TCEs at the international level.

As a result of these multilateral efforts, the World Intellectual Property Organization (WIPO) General Assembly was held in October 2000, and decided to establish the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

Issues regarding the international protection of TCEs were discussed in the 1st session of the IGC held in April 2001, and as of October 2010, up to 16 sessions were held, while the 17th session is scheduled to be held at the WIPO Headquarters in Geneva, Switzerland.

II. History of the Protection of TCEs²⁾

1. Provision of International Protection for ‘Unpublished Works’ in the Berne Convention for the Protection of Literary and Artistic Works (1967)

The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention made an attempt to introduce copyright protection for folklore at

2_ See WIPO, “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore,” Background Paper No. 1, p.21-24.

the international level. As a result, Article 15, Paragraph 4³⁾ of the Stockholm (1967) and Paris (1971) Acts of the Bern Convention contains the provision of unpublished works. This Article of the Bern Convention, according to the intentions of the Revision Conference, implies the possibility of granting protection for TCEs. Its inclusion in the Berne Convention responds to calls made at that time for specific international protection of TCEs.

2. Tunis Model Law (1976)

The Tunis Model Law provides specific protection for works of national folklore. Such works need not be fixed in material form in order to receive protection and their protection is without limitation in regards to time.

3. The Model Provisions (1982)

In 1982, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions were adopted under the auspices of WIPO and UNESCO.

Expressions of folklore, which represent an important part of cultural heritage, is susceptible to various forms of illicit exploitation and prejudicial actions and the dissemination of folklore might lead to improper exploitation of the cultural heritage of a nation. Also, given that any abuse of commercial nature or any distortion of expressions of folklore is prejudicial to the cultural and economic interests of the nation, the Model Provision is significant in the sense that the protection of folklore should be indispensable as a means of promoting its further development, maintenance and dissemination.

Regarding the implementation of the Model Provisions, several countries have used it as a basis for national legal regimes for the protection of folklore.

3_ Article 15, Paragraph (4) of the Bern Convention is as follows:

- (4) (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that the author is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.
- (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Many of these countries have enacted provisions for the protection of folklore within the framework of their copyright laws.

4. Attempts to Establish an Instrument from 1982-1985

WIPO and UNESCO followed such suggestions when they jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, which met in Paris from 10 to 14 December 1984. However, the great majority of the participants agreed that it was premature to establish an international treaty since there was not sufficient experience available in regards to the protection of expressions of folklore at the international level (in particular, concerning the implementation of the Model Provisions).

The Executive Committee of the Bern Convention and the IGC of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the report of the group of experts and, in general, agreed with its findings. However, an overwhelming majority of participants were of the opinion that an international treaty for the protection of expressions of folklore was premature.

5. The Adoption of the WIPO Performances and Phonograms Treaty in 1996

Folktales, poetry, songs, dances, plays and similar expressions of folklore actually live in the form of regular performances. Therefore, if the protection of performers is extended to the performers of such expressions of folklore, the performances of such expressions of folklore also enjoy protection. The WIPO Performances and Phonograms Treaty, which was adopted in December 1996, provides that the definition of performer includes the performer of an expression of folklore.⁴⁾

4_ Article 2 (a) is as follows:

Article 2

Definitions

- (a) "Performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.

6. WIPO-UNESCO World Forum on the Protection of Folklore in 1997

Based on the recommendation made during the 1996 Diplomatic Conference, the WIPO-UNESCO World Forum on the Protection of Folklore was held in Phuket, Thailand in April 1997. Many issues related to the need for a new international instrument for the legal protection of folklore and the importance of the balance between the community owning the folklore and the users of expressions of folklore were addressed.

7. WIPO Fact-Finding Missions from 1998-1999

During 1998 and 1999, WIPO conducted fact-finding missions to identify the needs and expectations related to the intellectual property of 'traditional knowledge (TK)' holders.

Indigenous people, local communities, non-governmental organisations, governmental representatives, scholars, researchers and private sector representatives were among the groups of persons consulted on these missions. TK includes TCEs as a sub-set. Traditional cultural expressions include handicrafts and other tangible cultural expressions. Much of the information obtained on these missions is either related directly or indirectly to TCEs.

8. WIPO-UNESCO's Regional Consultations on the Protection of Expressions of Folklore in 1999

Pursuant to the suggestion included in the Plan of Action adopted at the WIPO-UNESCO World Forum on the Protection of Folklore in 1997, WIPO and UNESCO organised four Regional Consultations on the Protection of Expressions of Folklore in 1999. Each of the Regional Consultations adopted resolutions and recommendations which identified the needs and issues in intellectual property as well as proposals for future work related to expressions of folklore.

9. Establishment of the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore in 2000

At the end of 2000, the Member States of WIPO established an Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore for the purpose of discussion among Member States on these subjects attended the Committee meeting over 400 representatives consisting of Member States, IGOs and NGOs. The Committee has made substantial progress in addressing both policy and practical linkages between the intellectual property system and the concerns and needs of TK holders and custodians of traditional culture.

III. Major Agendas and Trends of the IGC Regarding WIPO GRTKF⁵⁾

1. First Session ^{30 April - 3 May, 2001}

The first session provided a useful basic framework for future discussion by confirming the opinions of each group and nation about the protection of folklore. Most developing countries including the African Group and the Latin American Group insisted on active protection and were in need of support pertaining to publicity or education for their respective countries as well as the communities which inhabit them regarding these issues.

However, a group of developed countries agreed on the discussion but took a passive position on the requirements of developing countries to protect folklore in a different scheme from the existing legal system. Some developed countries even argued that it is a precondition to verify whether it is an issue of intellectual property. They claimed that if it was an intellectual property issue, it would be appropriate to discuss within the existing intellectual property regimes, otherwise there would be no need for discussion.

5_ The agendas of the 1st and the 2nd sessions are summarized from the Korean Intellectual Property Office documents. Those of the 3rd, 7th, 8th, 10th, 13th and 15th sessions are documents from the WIPO. I have summarized the agendas from the 4th, 6th, 11th, 12th and 16th sessions and the 1st IWG because I participated in those sessions as a delegate. The agenda from the 5th, 9th, and 14th IGC are not included in this paper.

2. Second Session 10-14 December, 2001

The session was initiated by developing countries, and most countries argued the establishment of the *sui generis* system for the legal protection of folklore which could not be protected under existing intellectual property rights and required financial assistance in order to ensure the participation of indigenous and local communities at the sessions of the Committee. However, a clear definition of the *sui generis* system could not be identified in the meeting of developing countries including all three groups of Africa, Latin America and Asia and was left for further discussion.

3. Third Session 13-21 June, 2002

There was a disagreement among the groups. The Africa, Latin America and Asia groups strongly argued for the necessity of the protection of folklore and voted in favour of the case study, a revision of the Model Provisions, and the preparation of an international protection system. On the other hand, USA, Canada, the European Community and Australia agreed on the actual case study, but disagreed on the revision of the Model Provisions and the preparation of the international protection system insisting that it was premature for such actions to be taken at that stage. The chairman requested that the Secretariat conduct empirical, analytical and systematic research on various practices of folklore use, practical research on the relationship between customary laws and the system of intellectual property rights, and research on experiences of the individual nation.

4. Fourth Session 9-17 December, 2002

A systematic report⁶⁾ on national experiences with a legal protection of expressions of folklore was presented and a brief report⁷⁾ on technical cooperation of the legal protection of expressions of folklore followed. Also, there was a report of actual case studies and discussions on the nations or regions

6_ WIPO/GRTKF/IC/4/3.

7_ WIPO/GRTKF/IC/4/4.

which had a special legal protection system for expressions of folklore such as New Zealand, Panama, Nigeria, Russia and the Pacific Island countries. New Zealand presented the case of exploitation, the system of national law, and a method for dispute resolution. Many inquiries were made regarding the distribution of commercial benefits derived from the use of folklore and the sharing of benefits in the local communities which involved the interests of many nations. To answer the questions pertaining to the distribution of benefits, it seemed that arrangements were made through consent or negotiation rather than through a legal system.

5. Sixth Session *15-19 March, 2004*

As some communities took a more reserved position toward the negative connotation behind the term 'folklore,' it is agreed that, apart from the documents of the IGC, 'traditional cultural expressions (TCEs)' would be used instead of 'folklore.'

The issues regarding the policies and legal options⁸⁾ for the protection of TCEs are described based on the document from the fifth session.⁹⁾ The document categorises various and concrete measures and the objectives of key policies for the protection of TCEs. Each nation generally agreed on the contents of policies and legal options for the protection of TCEs.

After the Secretariat's brief explanation on the background of the document regarding the international protection scheme which was an order from the committee, there was a discussion on the international protection scheme including the creation and development of an international legal organisation. However, the discussion was more focused on the Convention for Biological Diversity (CBD) which is related to traditional knowledge (TK) and genetic resources (GR) rather than TCEs, and it fired up fierce argument among the nations. The gap between developing countries and developed countries has yet to be narrowed.

During the discussion on the scope of international protection,¹⁰⁾ some nations suggested taking time to reconsider, but others agreed that the discus-

8_ WIPO/GRTKF/IC/6/3.

9_ WIPO/GRTKF/IC/5/3.

10_ WIPO/GRTKF/IC/6/6.

sion was positive and worthwhile, emphasising the necessity to be extended in depth.

6. Seventh Session *1-5 November, 2004*

The gap between developing countries and developed countries regarding the protection of expressions of folklore and international instruments still exists. Although there was little progress on the issues centred around documents from the Secretariat, developing countries requested the establishment of international instruments whereas developed countries insisted protection should be managed within the existing scheme. While the African Group and NGOs came to a consensus, the group of developed countries and Asian countries failed to. The group of developed countries supported major issues, but opposed specific matters.

7. Eighth Session *6-10 June, 2005*

In this meeting, it was reconfirmed that the gap between the two groups still existed. Although there was slightly further progress regarding issues on the documents from the Secretariat, the two groups did not agree on whether they should discuss substantive provisions in the agenda related to TCEs and TK. The group of developing countries expressed deep dissatisfaction as there was no progress in the discussion of legally binding international instruments for the protection of GR, TK, and folklore which faced strong opposition from the USA.

8. Tenth Session *30 November-8 December, 2006*

After an agreement was made on the objectives and principles of the protection of expressions of folklore, developed countries such as Japan, USA, Canada, and Switzerland argued that it was necessary to discuss substantive provisions while the African Group, Brazil, India, and Iran maintained that it was more urgent to establish legally binding international instruments. Suggestions from nations like Nigeria and Indonesia stating that detailed arguments should be listed for efficient discussion was accepted. It was agreed that

from the next meeting the discussion should follow the order of the list of issues provided below, and the discussion be limited to the modification of each nation's opinion on the existing issues.

9. Eleventh Session 3-12 July, 2007

<Ten Issues for the Protection of TCEs/EoF>

- ① Definition of TCEs/EoF need to be protected
- ② Rightful person and beneficiaries of TCEs/EoF
- ③ Subject matter on the protection of Intellectual Property Rights (property rights, personal rights)
- ④ Forms of unacceptable and illicit actions regarding protectable TCEs/EoF
- ⑤ Exceptions and limitations of the protectable right of TCEs/EoF
- ⑥ Term of Protection
- ⑦ Additional protection regarding the protection of existing Intellectual Property Rights
- ⑧ Sanctions or punishment for unacceptable or illicit actions
- ⑨ Distinction between international and domestic issues, and international and national regulations
- ⑩ Treatment of foreign rightful persons and beneficiaries

In this meeting, the gap between the two groups was not resolved and the options exchanged between Member States and NGOs did not lead to any substantive conclusions on the objectives and principles.

Developed countries such as Japan, USA and the EU argued that it was appropriate to discuss substantive provisions after an agreement was made on the objectives and the principles. Besides, they claimed that it was not recommendable to discuss details before an agreement has been made on exceptions and limitations, sanctions, penalties, and terms of protection.

The African Group, including Algeria, mentioned that developed countries were deliberately procrastinating on the progress of the discussion, emphasising the necessity for more active discussion on the objectives and principles, and argued that more detailed discussion for substantive provisions and legally binding international instruments should be established. Additionally, they mentioned that special measures and systems were required in order to protect TCEs efficiently.

10. Twelfth Session 25-29 February, 2008

The session was lead by ‘Factual Extraction’¹¹⁾ and each nation and NGO exchanged opinions on 10 issues regarding the protection of TCEs/EoF. The opinion gap was still in place and delegates merely exchanged their opinions.

USA, Japan and other developed countries expressed their opinions stating that it was recommendable to discuss substantive provisions (rights of holders and beneficiaries, economic rights and moral rights, exceptions and limitations, terms of protection, and sanctions and penalties) after an agreement on the definition of TCEs/EoF had been made among the delegates.

The African Group including Nigeria and Algeria and the NGOs maintained that throughout the 12 meetings opinions of each nation were well understood, and it was time to proceed with a rapid discussion on substantive provisions for international legally binding instruments. Based on a suggestion by Brazil, the Secretariat prepared a Gap Analysis as data for the next meeting.

11. Thirteenth Session 13-17 October, 2008

There have been negotiations over the development of measures for the international protection of TCEs. In the case of difficulty in drawing up a treaty, the necessity to make an ‘international legally binding instrument,’ which is more flexible than a treaty, was proposed.

Developing countries such as countries in Africa and India emphasised the necessity of documentation with a legally binding international instrument for justice and equality given that existing international conventions for intellectual property rights tend to serve the interests of developed countries.

The European Community and USA expressed a strong repulsion toward the terms ‘legally binding,’ ‘document,’ and ‘based on the document’ refusing to agree on the suggestion.

Also, it was pointed out that many of the countries did not have a deep enough understanding of what TCEs, TK, and GR were, and what to protect. The Gap Analysis was introduced to resolve this problem, but did not have good results.

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11_ WIPO/GRTKF/IC/12/4(b).

12. Fifteenth Session ^{7-11 December, 2009}

Although delegates discussed the possibility of convening the Intersessional Working Group (IWG), there was a disagreement between the developed and developing countries on the formation of the working group. Regarding the composition of the IWG, developed countries preferred an open-ended format, which all the experts from interested countries could participate without any limitations; however, developed countries argued that the IWG should consist of a small number of experts.

13. Sixteenth Session ^{2-7 May, 2010}

Until now, developing countries have expressed their desire to take a position in favour of international legally binding instruments for the protection of TCEs and the establishment of a separate international instrument in order to avoid overlapping with the existing scheme of intellectual property right.

Developed countries argued that the international instrument should be more flexible, and it was necessary to concentrate on the clarification of terms and definitions and enhancement of its understanding. Despite the fierce opposition¹²⁾ on the management of the IWG, the delegates managed to agree on the last day to convene the 1st IWG¹³⁾ meeting in July 2010.

Negotiations for the articles on TCEs have been conducted in such a way that the opinions of each nation on the 'Scope of Protection' (Article 3) and 'Management of Rights' (Article 4) were presented first, and then revised where necessary.

Article 3 is about the scope of protection which is crucial for preservation and aims to present measures for protection on cultural expressions or knowledge. Article 4 describes to whom and how authorisations to use TCEs/EoF are applied. The provisions as a whole envisage the employment of rights by the relevant communities themselves. However, in cases where the relevant communities are not able to or do not wish to exercise their rights directly, the

12_ The African Group suggested a close-ended format whereas developed countries argued that an open-ended format was more appropriate to guarantee the clarity and inclusiveness of proposed subject matters.

13_ The IWG aims to accelerate and support the IGC negotiation, and report technical and legal recommendations to the IGC. During the session, the IWG dealt with one agenda. Moreover, the IWG convened as an open-ended meeting, but restricted participants to the meeting to one technical expert from each country and approved observers.

Article suggests a role for an agency acting at all times at the request of, and on behalf of, relevant communities

14. First IWG *18-25 July, 2010*

As agreed in the sixteenth session of the WIPO IGC, the Intersessional Working Group (IWG) is to support and facilitate the negotiations of the IGC. The IWG role includes reporting legal and technical advice and analysis to the IGC. Its participants consist of one technical expert from each Member State and accredited observers. They negotiated on the basis of the document WIPO/GRTKF/IC/17/4 Prov.

Articles in the revised draft for the protection of TCEs are as follows:

- Objectives and Principles

- Substantive Principles

Article 1 Subject Matter of Protection

Article 2 Beneficiaries

Article 3 Acts of Misappropriation and Misuse (Scope of Protection)

Article 4 Management of Rights

Article 5 Exceptions and Limitations

Article 6 Term of Protection

Article 7 Formalities

Article 8 Sanctions, Remedies, and Exercise of Rights

Article 9 Transitional Measures

Article 10 Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion

Article 11 International and Regional Protection

Most of the delegates agreed that as objectives and principles are the basis of substantive provisions, protection should cover not only indigenous people, but local communities as well.

Article 1 (Subject Matter of Protection) emphasises that TCEs and/or EoF are any form, tangible or intangible, in which traditional culture and knowledge are embodied and have been passed on from generation to generation. Although there was an opinion to delete all the examples of TCEs and it was agreed in an informal working group to summarise the Article with inclusive

words and delete unnecessary examples.

Article 2 (Beneficiaries) suggests that measures for the protection of TCEs should be for the benefit of indigenous people, local communities, cultural communities and/or nations.

Article 3 (Acts of Misappropriation (Scope of Protection)) refers to the definitions of misappropriation or misuse, but the actual scope of protection. It was named the “Scope of Protection” in the Informal Working Group.

Article 4 (Management of Rights) states that the consent to the use of TCEs should be given by the competent authority.

Article 5 (Exceptions and Limitations) notes that measures for the protection of TCEs should not restrict the normal use, transmission, exchange and development of TCEs within the traditional and customary context by members of the indigenous people and local communities as determined by customary laws and practices, and present exceptions as seen in intellectual property rights.

Article 6 (Term of Protection) is about whether to limit the time of protection or to provide protection permanently. Most delegates maintained that TCEs have been passed on from generation to generation and should be protected indefinitely.

Article 7 (Formalities) suggests non-formality according to the objectives and principles of TCEs in the documents submitted by the Informal Working Group, although formality such as registration has been adopted in the existing documents.

Article 8 (Sanctions, Remedies, and the Exercise of Rights) defines criminal sanctions, civil remedies and exercise. In the draft articles from the informal working group, there were 3 options: consistency with other instruments; more prescriptive, but limits on criminal remedies; and Parties may wish to provide criminal and civil remedies as they deem appropriate.

Article 9 (Transitional Measures) defines that these provisions apply to all TCEs which, at the moment of the provisions coming into force, fulfil the criteria set out in Article 1.

Article 10 (Relationship between Intellectual Property Protection and other forms of Protection, Preservation and Promotion) emphasises complementary protection of relevant international legal instruments and suggests three options.

Article 11 (International and Regional Protection) notes that the rights and benefits arising from the protection of TCEs under national measures or laws that give effect to these international provisions should be available to all

eligible beneficiaries who are nationals or residents of a prescribed country as defined by international obligations or undertakings.

IV. Conclusion

Since the establishment of the Intergovernmental Committee of WIPO in 2001 for the protection of TCEs, 17 sessions including the first IWG meeting have been held over the past nine years. As a result, a draft on 'objectives and principles' and 'substantive principles' for the protection of TCEs was made and examined for revision. Given the situation, in terms of the discussion for protection of GRTKE, more progress has been made on TCEs than TK or GR.

However, it may take a while to achieve a consensus on the protection of TCEs in an international dimension among the WIPO Member States and establish an international instrument as the gap between opinions from developed and developing countries is still wide; and considering the discord of opinions among the two groups, many terms, structures, and contents of articles mentioned in the draft agreement need to be discussed.

WIPO discussions can be summarised into two opinions: first, there is an opinion from the nations who are sceptical of the adoption of the new system or measures for the international protection of TCEs, and prefer to use TCEs without any restriction. These countries argue that issues of TCEs should be dealt with within the existing scheme of intellectual property rights and try to minimise the scope of protection; second, the countries which possess a lot of TCEs and regions where many local communities or indigenous people live request the *sui generis* systems for protecting TCEs as they cannot be properly protected under the present legal schemes. Moreover, they argue that new instruments are absolutely necessary as there are many domains of existing TCEs which cannot be protected by the intellectual property system.

To conclude, it is necessary to urgently conduct research regarding the existence of traditional cultural expressions of Korea and case studies on various forms of misappropriation and misuse such as distortion of the traditional cultural expressions. After that, it might be possible to discuss the details with WIPO and the IGC, and react more effectively for the protection of traditional cultural expressions.