

DRAFT

SUMMARY OF SELECTED KEY ISSUES PROPOSED FOR DISCUSSION BY THE CHAIR

AGENDA ITEM 6: TRADITIONAL CULTURAL EXPRESSIONS

IGC 19TH SESSION

July 18 to 22, 2011

Reference document: Draft Articles on the Protection of Traditional Cultural Expressions,
WIPO/GRTKF/IC/19/4

Articles suggested for discussion: Articles 1 (protectable subject matter), 2 (beneficiaries), 3 (scope of protection) and 5 (exceptions and limitations)

1. Subject Matter and Definitions (Article 1)

Article 1 defines the scope of protected TCEs. There are important links with Article 2.

Paragraph 1 sets out a description of the potential subject matter, listing its characteristics, such as being "transmitted from generation to generation", for example. The Committee might wish to reflect upon whether the definition of TCEs should:

- include a **list of examples**, as is presently the case in subparagraphs (a) to (d); or
- remove the specific examples which are currently listed but keep the **general introductory categories of TCEs**, such as "phonetic or verbal", "musical", "tangible" and expressions "by action"; or
- leave it to national legislation to specify the types of expressions that could be the subject matter of protection, essentially **removing the list of examples**.

Question: can the list of examples in paragraph 1 of Article 1 be removed?

Paragraph 2 of Article 1 sets out the substantive criteria, which specify which TCEs would be protectable. The Committee could look very carefully at the terminology used to designate and capture the key elements of the subject matter as well as related terms, such as "characteristic," "indicative" and "unique."

Question: are these terms synonyms, and in that case, which term should be kept?

Alternatively, what are the differences and commonalities between those terms?

Also, there is some repetition in the language of the body of paragraph 2 and sub-paragraphs (a), (b) and (c) of **Article 1**, as well as with the last paragraph of **Article 2**.

Question: could the body of paragraph 2 of Article 1 be kept, dispensing with sub-paragraphs (a), (b) and (c)? Or, could some of the text be merged?

Finally, there is also a long list of potential beneficiaries in sub-paragraph (c).

Question: could sub-paragraph (c) simply mention "beneficiaries" and refer to Article 2?

2. Beneficiaries (Article 2)

The scope of beneficiaries is one of the key outstanding policy issues, currently laid out in Article 2.

Question: could Article 2 provide the general definition or description of "beneficiaries", including a list of potential beneficiaries, for the purposes of the entire text on TCEs? Any mention of beneficiaries in other articles would simply refer to "beneficiaries" or to "beneficiaries as defined in Article 2".

Furthermore, in the first cluster of options, Option 1 is a **closed list**, whereas Option 2 is an **open-ended list**, introduced by "including / for example".

Question: could the Committee merge these two options, perhaps by putting the words "including / for example" in brackets?

In the second set of options, there could also be a possibility for merging the two options.

Question: if Option 1 made a reference to "customary laws", would it then be possible to dispense with Option 2?

3. Scope of Rights (Article 3)

Article 3 defines the scope of protection against misuses and misappropriations of TCEs, which complements protection mechanisms currently available under existing conventional IP law.

Alternative 3 is an attempt to merge and streamline the ideas and issues contained in both Alternatives 1 and 2.

Question: Could Alternative 3 constitute a basis for future work?

Moreover, the language on secret TCEs in Alternative 3 is similar to that of Article A. Notably, it covers issues such as fixation, disclosure, use or other exploitation of secret TCEs.

Question: Could Article A be deleted, considering Alternative 3 already contains some language on secret TCEs?

4. Exceptions and Limitations (Article 5)

In Paragraph 2 of Article 5, uses of protected TCEs would be permitted provided they comply with the test known as the "three-step test" in copyright law. In Paragraph 2, *alternative*, uses of protected TCEs would be permitted provided they are fair and there has been attribution and respect for the TCE. In Paragraph 3, uses would be permitted if they would be permitted for copyright works under copyright law (and, *mutatis mutandis*, trademarks), provided such uses comply with the three-step test. These three paragraphs are trying to find the appropriate basis on which Member States can allow uses of protected TCEs and tend roughly in the same direction.

Question: is it possible to merge these paragraphs and/or select only one as the basis for continuing work?

As to **Paragraph 4 (b)**, there is a specific exception for inspiration and borrowing from TCEs. This paragraph raises a number of significant policy questions.

Question: Could the Committee consider and comment on this policy question?
