



Articles on the Protection of Traditional Cultural Expressions

Discussion Draft for the Thirty-Fourth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore World Intellectual Property Organization Geneva, Switzerland, June 12 to 16, 2017

Dear Leaders:

The World Intellectual Property Organization is a specialized agency of the United Nations that promotes the protection of intellectual property throughout the world. WIPO is considering the adoption of Articles to protect the traditional cultural expressions of indigenous peoples. The WIPO Committee charged with this task will hold an important session in Geneva on June 12-16, 2017. On May 4-5, 2017, the Native American Rights Fund and the University of Colorado Law School hosted a drafting session to propose text for the upcoming negotiations. Our draft is attached, and we are seeking your comments and support. You are invited to join a conference call to discuss on May 24, 2017 at 2pm eastern, Dial In: 888.244.8150 Pass Code: 2267767#.

The United States is a WIPO Member State, and the U.S. Patent and Trademark Office is the primary federal agency that engages with WIPO. NCAI will host a consultation session with the Patent and Trademark Office and other federal agencies on June 12, the day before the NCAI Midyear at Mohegan, 1pm to 4pm in the Shinnecock Room. This is an opportunity to urge the United States to fully protect the cultures of Tribal Nations on the international level.

The attached draft represents a new direction. The earlier work of the WIPO Committee focused on levels of protection for various categories of traditional cultural expressions. This approach is problematic because it assumes western values that promote transfer and dissemination to the public domain. In contrast, indigenous peoples value the permanent retention of traditional cultural expressions. This unresolved tension is reflected throughout the earlier drafts. Our new draft shifts the focus to areas where we are more likely to find a path forward.

First, we focus on the problem of **theft and illegal possession**. For example, recently there was international attention focused on the proposed illegal sale of the Acoma Shield by a French auction house. Our new language would require WIPO Member States to ensure that effective criminal and civil enforcement procedures are available to prevent and redress theft and illegal possession, sale, transfer, and export of traditional cultural expressions.

Second, we address **false marketing**. For example, the Navajo Nation recently settled extensive litigation with a clothing retailer over misuse of the Navajo name. Our new language would require member states to provide legal mechanisms to prevent and redress marketing of traditional cultural expressions that falsely suggests invention or production by indigenous peoples, or marketing likely to cause confusion or to deceive as to affiliation, connection, association, origin, sponsorship, approval or endorsement by indigenous peoples.

The new language is found in Section 5 of the attached draft. We encourage you to review the entire document and to please join us at the June 12 consultation with the Patent & Trademark Office. Or, even better, we would encourage at least some tribes to consider attending the upcoming meeting in Geneva, Switzerland. This is a key time for protection of tribal cultural resources on the international stage. Please contact us if you have questions on how to attend.

The following are a few notes for your consideration of the attached draft which is intended as a baseline document for consultation and negotiation.

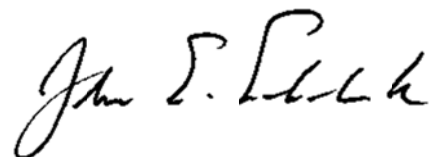
- 1) Our draft is based on the existing draft from WIPO, which can be found [here](#).
- 2) We made choices among the identified alternatives throughout, with amendments to key provisions.
- 3) We did not attempt to edit the principles/preamble because of the unresolved tension in goals. That section might be simplified or eliminated. We drafted our own set of proposed principles which are attached.
- 4) Professors Mathew Fletcher and Kristen Carpenter are working on a background document with examples of misuse of indigenous peoples' traditional knowledge and cultural expressions.
- 5) We used the term "indigenous peoples" throughout rather than "beneficiaries" because there did not seem to be any accepted definition of "beneficiaries."
- 6) NCAI Resolution PHX-16-054 is attached, and urges the U.S. to consult with Tribal Nations on matters which may affect protection of indigenous traditional knowledge.

Please contact Melody McCoy mmccoy@narf.org or Sue Noe suenoe@narf.org, or John Dossett, jdossett@ncai.org if you have comments or questions or if we can provide any additional information.

Sincerely,



Brian Cladoosby, NCAI President
5/16/17



John Echohawk, NARF Executive Director

Protection of Traditional Cultural Expressions: Draft Articles

NARF/University of Colorado Law/Tulalip Tribes/ATNI/NCAI

Working Draft for Discussion with Tribal Leaders

[Based on Facilitators' Rev. 2 \(as at the close of IGC 33 on March 3, 2017\)](#)

May 15, 2017

PRINCIPLES/PREAMBLE/INTRODUCTION

We did not attempt to edit this section, because some principles in the draft are fundamentally in tension. In particular, one cannot respect the rights of Indigenous Peoples over their traditional cultural expressions and at the same time promote transmission into the public domain. Our suggestion would be to simplify this section focusing on (1) the purpose to maintain the cultural identity of Indigenous Peoples and (2) that Indigenous Peoples should retain the economic benefit from traditional cultural expressions, if they choose to share them.

In addition, we have attached a short statement of principles from the standpoint of Indigenous Peoples in the United States.

ARTICLE 1

POLICY OBJECTIVES

Alt 1 – as edited

This instrument should aim to:

1. Provide Indigenous Peoples with the means to:
 - (a) prevent misappropriation and offensive and derogatory use of their traditional cultural expressions;
 - (b) control ways in which their cultural expressions are used beyond the traditional and customary context;
 - (c) promote equitable compensation for use of traditional cultural expressions with free, prior and informed consent; and
 - (d) encourage and protect creation and innovation.

ARTICLE 2

TERMS

For the purposes of this instrument:

“Traditional cultural expressions” are tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include traditional music, performances, ceremonies, narratives, names and symbols, designs, and architectural forms.

“Traditional knowledge” is cultural heritage, practices and knowledge systems of Indigenous Peoples. It embraces content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge.

ARTICLE 3
ELIGIBILITY FOR PROTECTION

New Alternative

To be eligible for protection, traditional cultural expressions shall be associated with the cultural heritage of Indigenous Peoples and may be dynamic and evolving.

ARTICLE 4
BENEFICIARIES

Alt 1 - as amended

Beneficiaries of this instrument are Indigenous Peoples and local communities who own, steward, hold, express, create, maintain, use, and develop traditional cultural expressions.

ARTICLE 5
SCOPE OF [PROTECTION

New Alternative

5.1 Member States shall safeguard the economic and moral interests of Indigenous Peoples in their traditional cultural expressions.

5.2 Member States shall protect the right of Indigenous Peoples to define their traditional cultural expression and the forms of protection.

5.3 Member States shall ensure that effective criminal and civil enforcement procedures are available to prevent and redress theft and illegal possession, sale, transfer, and export of traditional cultural expressions.

5.4 Member States shall provide legal mechanisms to prevent and redress marketing of traditional cultural expressions that falsely suggests manufacture or production by Indigenous Peoples, or that is likely to cause confusion or to deceive as to affiliation, connection, association, origin, sponsorship, approval or endorsement by Indigenous Peoples.

5.5 Member States shall work in conjunction with Indigenous Peoples to implement each provision in this instrument.

ARTICLE 6
ADMINISTRATION OF RIGHTS

Alt 1 – as amended

Member States, in consultation with Indigenous Peoples, shall establish, or designate, a competent authority or authorities, in accordance with national law, to administer the rights provided for by this instrument.

ARTICLE 7
EXCEPTIONS AND LIMITATIONS

New Alternative

In complying with the obligations set forth in this instrument, Member States may adopt exceptions only in special cases and with the free, prior and informed consent of the affected Indigenous Peoples.

ARTICLE 8
DURATION OF PROTECTION

New Alternative

The traditional cultural expressions of Indigenous Peoples shall be protected indefinitely, unless Indigenous Peoples themselves establish other appropriate terms of temporal protection for their traditional cultural expressions.

ARTICLE 9
FORMALITIES

Option 1 – as amended

9.1 Member States shall not subject the protection of traditional cultural expressions to any formality.

ARTICLE 10
SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

New Alternative

10.1 Member States shall ensure that accessible and effective criminal and civil enforcement procedures are available under their laws to ensure the application of this instrument. Indigenous Peoples shall have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

10.2 Member States shall provide effective redress, including repatriation, developed in consultation with Indigenous Peoples, with respect to their traditional cultural expressions taken without their free, prior and informed consent or in violation of their laws, traditions or customs.

ARTICLE 11
TRANSITIONAL MEASURES

As amended

11.1 This instrument shall apply to all traditional cultural expressions that, now or in the future, fulfill the criteria set out herein.

11.2 Continuing acts commenced prior to the coming into force of this instrument that would be prohibited or regulated by this instrument shall be brought into conformity within a reasonable period of time after its entry into effect, subject to paragraph 3.

11.3 Indigenous Peoples shall have the right of immediate recovery with respect to their traditional cultural expressions that they identify as having special significance for them.

ARTICLE 12
RELATIONSHIP TO OTHER INTERNATIONAL AGREEMENTS

As amended

12.1 Member States shall implement this instrument in a manner mutually supportive of other international agreements.

ARTICLE 13
NATIONAL TREATMENT

As amended

Member States shall accord Indigenous Peoples that are nationals of other Member States treatment related to protection of their traditional cultural expressions that is no less favorable than provided for under this instrument.

ARTICLE 14
TRANSBOUNDARY COOPERATION

As amended

In consultation with the Indigenous Peoples concerned, Member States shall co-operate to implement this instrument when traditional cultural expressions are located in territories of different Member States.

ARTICLE 15
CAPACITY AND AWARENESS

As amended

15.1 Member States shall cooperate in building capacity and strengthening human resources, for effective implementation of this instrument.

15.2 Member States shall provide necessary resources for Indigenous Peoples to develop capacity-building projects within their communities.

15.3 Member States shall take measures to raise awareness of this instrument, and in particular to educate users and holders of traditional cultural expressions of their obligations under this instrument.

ARTICLE 16
NON-DEROGATION

As amended

Nothing in this instrument shall be construed to diminish or extinguish the rights that Indigenous Peoples have now or may acquire in the future.

[End of Annex and of document]

Guiding Core Principles
for WIPO IGC Instrument Negotiations
Prepared by Tribal WIPO Work Group
for NCAI
Working Draft May 5, 2017:

- **Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (UNDRIP Art. 3)**
- **Indigenous Peoples own and control their TK, GR & TCE under their laws including for both disclosed and undisclosed TK, GR & TCE. (UNDRIP Arts. 25, 31)**
- **Indigenous Peoples have the right to uphold their responsibilities regarding their TK, GR & TCE. (UNDRIP Arts. 13, 25)**
- **Nothing in this Instrument may be construed as diminishing or extinguishing the rights Indigenous Peoples have always had, have now or may acquire in the future. (UNDRIP Art. 45)**
- **Member states shall provide redress through effective mechanisms, which may include restitution or criminal penalties, developed in conjunction with Indigenous Peoples, with respect to TK, GR & TCE taken or used without their free, prior and informed consent or in violation of their laws, traditions, and customs. (UNDRIP Arts. 11, 20 28, 32)**



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #PHX-16-054

TITLE: Calling for Immediate and Direct Consultation by the United States with Tribes Regarding On-Going International Negotiations in the World Intellectual Property Organization on Matters that May Affect Tribal Sovereignty including Protection of Indigenous Traditional Knowledge

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the World Intellectual Property Organization (WIPO), within the United Nations System, is an international Specialized Agency that reports to the Economic and Social Council, which in turn reports to the Committee on Social, Humanitarian and Cultural and Human Rights, which in turn reports to the U.N. General Assembly; and

WHEREAS, in 2000 WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; and

WHEREAS, in 2009 WIPO agreed to develop an international legal instrument (or instruments) that would protect indigenous genetic resources, and traditional knowledge and traditional cultural expressions; and

WHEREAS, the United States has been participating in the WIPO negotiations of this international legal instrument (or instruments) that would protect indigenous genetic resources, and traditional knowledge and traditional cultural expressions; and

WHEREAS, the United States Department of State has delegated authority to the United States Patent and Trade Office (USPTO) for these WIPO negotiations; and

WHEREAS, the USPTO in these on-going WIPO negotiations has taken or is taking positions that directly abrogate, diminish or impinge upon tribal sovereign rights and jurisdiction, particularly regarding indigenous traditional knowledge and traditional cultural expressions; and

WHEREAS, the USPTO in these on-going WIPO negotiations recently has introduced text that could lead to a binding international treaty that establishes, confirms or asserts the plenary authority of intellectual property offices around the world to regulate indigenous traditional knowledge and traditional cultural expressions; and

WHEREAS, the USPTO's WIPO negotiating positions and text assert that indigenous traditional knowledge and traditional cultural expressions can and should be protected only for a limited duration of time and with limited protections; and

WHEREAS, the USPTO's WIPO negotiating positions and text assert that the majority of indigenous traditional knowledge and traditional cultural expressions is already in the public domain, and that the USPTO has the authority to place indigenous traditional knowledge and traditional cultural expressions into the public domain, notwithstanding indigenous peoples' right to free, prior and informed consent for its access and use, and other rights as embodied in the United Nations Declaration on the Rights of Indigenous Peoples and tribal treaties and other federal law; and

WHEREAS, the USPTO's WIPO negotiating positions and text assert that it has the authority to unilaterally abrogate, diminish or impinge upon tribal sovereign authority, by subjecting indigenous traditional knowledge and traditional cultural expressions to claims by non-tribal citizens, entities, and governments to access and use indigenous traditional knowledge and traditional cultural expressions without indigenous peoples' free, prior and informed consent, and in contravention of tribal treaties and other federal law; and

WHEREAS, in 16 years and over 30 WIPO discussion and negotiations sessions, neither the USPTO nor any other U.S. agency has engaged in formal government-to-government consultation with tribes or achieved free, prior and informed consent on negotiating positions or text regarding indigenous traditional knowledge and traditional cultural expressions; and

WHEREAS, tribal sovereign authority over traditional knowledge and traditional cultural expressions has never been ceded to the United States, nor expressly abrogated or diminished by an act of Congress.

NOW THEREFORE BE IT RESOLVED, that the USPTO, the State Department and any other applicable federal agency involved in the WIPO IGC negotiations on indigenous intellectual property, genetic resources, and traditional knowledge and traditional cultural expressions should immediately begin a direct formal government-to-government consultation with tribes, regarding the United States' WIPO negotiating positions and textual recommendations regarding traditional knowledge and traditional cultural expressions; and

BE IT FURTHER RESOLVED, that the United States Government should direct the USPTO and any other applicable federal agency, in such consultations with tribes, to recognize and

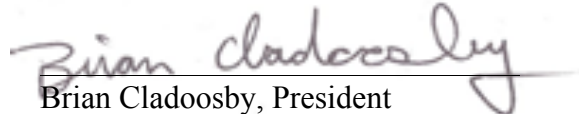
protect tribal sovereign rights and authority over traditional knowledge and cultural expressions; and

BE IT FURTHER RESOLVED, that the United States Government should ensure that in the transition to the next Presidential Administration that actions will be taken to ensure tribal consultations and free, prior and informed consent in the development of domestic and international policies, rules, legislation, and instruments that affirm tribal sovereign rights and authority over indigenous traditional knowledge and traditional cultural expressions; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2016 Annual Session of the National Congress of American Indians, held at the Phoenix Convention Center, October 9th- 14th 2016, with a quorum present.


Brian Cladoosby, President

ATTEST:


Aaron Payment, Recording Secretary