

PROTECTING TRADITIONAL CULTURAL EXPRESSIONS: THE INTERNATIONAL DIMENSION

The international dimensions of the protection of traditional cultural expressions (TCEs), traditional knowledge (TK) and access to genetic resources (GR) were recently referred by the General Assembly of WIPO to the has requested the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)¹

In the field of intellectual property, almost more than any other field of law, the international dimension has played an important role in standard setting for domestic legislation. The obvious normative impact of the TRIPs Agreement is the most conspicuous recent example of this. However, until today there has been almost a complete absence of international norm-setting in the area of the protection of TCEs. In this area, it will probably be the weight of domestic legislation which will shape the form and standards of the global regulatory regime.

This paper examines the various abortive attempts at international standard setting in the field of TCEs and the likely impact of domestic legislative examples.

Berne Revision

At the Stockholm Conference to revise the Berne Convention which met between 13 June and 11 July 1967 and which was largely concerned with the clarification of the substantive provisions of the Berne Convention, there was the first significant agitation from developing countries for an acknowledgement of their particular circumstances in the international copyright regime. In meetings of the Intergovernmental Committee of the UCC and of the General Conference of UNESCO, concerns had been expressed about the unavailability in developing countries of high priced foreign scientific and technological books and the low availability of works in translation.² These issues had been addressed by a Copyright Seminar for African Countries, which met at Brazzaville in 1963.³ In addition to proposing reductions to the term of protection, this meeting suggested special provisions for the protection of folklore.

In the preparations for the Stockholm Conference, it was proposed that the concerns of developing countries could be accommodated in a separate protocol. This question was the subject of some fairly acrimonious debates at Stockholm.⁴ The critical issues were the

¹ Document WO/GA/30/8, paragraph 93.

² See I.A.Olian, 'International copyright and the Needs of Developing Countries: the Awakening at Stockholm and Paris' (1974) 7 *Cornel Int. L. J.* 81; N.M. Tocups, 'Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries' 91(1982) 29 *Journal of the Copyright Society* 129.

³ See C.F.Johnson, 'The Origins of the Stockholm Protocol' (1970) 18 *Bulletin of the Copyright Society* 91.

⁴ See eg S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works; 1886-1986*, London, 1987 at 607-620.

definition of developing country, translation rights and compulsory licensing. Both developed and developing countries were divided over whether the situation of developing countries would be improved by a lowering of the Berne standards. Although a Protocol was grudgingly adopted by the final plenary session of the Stockholm Conference it did not come into force as it failed to secure the requisite number of ratifications.

The subsequent Paris Revision Conference, which met from July 5 to 24, 1971, was to revise the provisions relating to developing countries which had been introduced at the Stockholm Conference.⁵ The Paris Act of the Berne Convention incorporated the Protocol concerning developing countries in an Appendix to the Act, thereby making it an integral part of the Act. This Appendix provided for a system of non-exclusive and non-transferable compulsory licences in respect of the translation and reproduction of works protected by the Convention. The Paris Act was signed on 24 July by the plenipotentiaries of 28 states.

The enduring effect of this Protocol is potentially quite significant, given that Article 9 of the TRIPs Agreement obliges Members of the WTO to comply with “Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.” Unfortunately, the Protocol and the Appendix failed to address the issue of TCE.

The first discussions of the possibility of international protection of folklore⁶ was precipitated by a memorandum of the Government of Bolivia to the Director General of UNESCO, sent in April 1973, requesting that Organization examine the opportunity of drafting an international instrument on the protection of indigenous creative works in the form of a protocol to be attached to the Universal Copyright Convention, which is administered by UNESCO. Following that request a study was prepared in 1975 by the Secretariat of UNESCO on the desirability of providing for the protection of the cultural expressions of indigenous peoples on an international scale. Because of a perception of the broad scope of this analysis, in 1977 the Director General of UNESCO convened a Committee of Experts on the Legal Protection of Folklore, which in a report in 1977 concluded that the subject required sociological, psychological, ethnological, politico-historical studies ‘on an interdisciplinary basis within the framework of an overall and integrated approach’.⁷

Folklore Protection

Pursuant to a resolution adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Belgrade, in September-October 1980 and a decision taken by the Governing Bodies of the World Intellectual Property Organization (WIPO) in November 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore

⁵ ‘The Berne Union and International Copyright in 1971’ (Jan. 1972) *Copyright* 11

⁶ Then the expression used to refer to TCE.

⁷ Study on the International Regulations of Intellectual Property, UNESCO/WIPO/WG.1/FOLK/3, Tunis, 11-13 July 1977.

was convened. After a series of meetings the Committee formulated *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* which were adopted by the two organizations in 1985. Pursuant to a resolution adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Belgrade, in September-October 1980 and a decision taken by the Governing Bodies of the World Intellectual Property Organization (WIPO) in November 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore was convened.

The General Conference of UNESCO at its 25th session in 1989 adopted a Recommendation on the Safeguarding of Traditional Cultures and Folklore, which proposed a programme of measures to be taken at the national level for the identification, conservation, preservation and dissemination of the cultural works of indigenous peoples.

Terminological Issues

Since the mid 1980s, when WIPO and UNESCO had convened a Group of Experts on the Protection of Expressions of Folklore by Intellectual Property, there has been a lively debate about the terminology which should be used to describe the creations of a cultural community. The representatives of the Spanish-speaking countries at the 1985 meeting of the Group of Experts took the position that "folklore" was an archaism, with the negative connotation of being associated with the creations of lower or superseded civilizations. However, over that objection, the 1985 meeting adopted the following definition:

Folklore (in the broader sense, traditional and popular folk culture) is a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

This definition was elaborated in the resultant *WIPO/UNESCO Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions*. The misgivings expressed about the negative connotations of the term folklore were deflected by participants at the 1985 meeting who pointed out that "in recent times the term 'folklore' obtained a new meaning and is widely accepted as a term suitable for the purposes of a relevant international treaty".⁸

This terminological approach persisted until the conclusion of the World Forum on the Protection of Folklore, convened by WIPO and UNESCO in Phuket in April 1997. That Forum was convened in response to the recommendations in February 1996 of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and the

⁸ 'Report', [1985] Copyright: Monthly Review of the World Intellectual Property Organization, 40 at 41.

Producers of Phonograms, that arrangements be made for the organization of an international forum to explore "issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore and the harmonisation of different regional interests".⁹

At the Forum, a number of speakers referred to the negative connotations and eurocentric definition of the term "folklore". For example, Mrs Mould-Idrissu, in a paper on the African Experience on the preservation and conservation of expressions of folklore¹⁰, observed that the western conception of folklore tended to focus on artistic, literary and performing works, whereas in Africa it was much more broad; encompassing all aspects of cultural heritage.¹¹ For example, she noted that under the Ghanaian Copyright Law of 1985, folklore included scientific knowledge. Speakers criticised the western attitude to folklore as something dead to be collected and preserved, rather than part of an evolving living tradition.¹² In a statement issued by Indigenous Australian representatives at the Forum, exception was taken to the use of "folklore" as being too narrowly defined and implying an inferiority of the cultural and intellectual property of Indigenous peoples to the dominant culture.¹³ The Indigenous Australian representatives expressed a preference for the term "Indigenous Cultural and Intellectual Property", which had been coined by Ms Erica Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹⁴

The expressions "Traditional Cultural Expressions" or "Traditional Knowledge", accommodate the concerns of those observers who criticize the narrowness of "folklore". However, the latter term significantly changes the discourse. Folklore was typically discussed in copyright, or copyright-plus terms.¹⁵ Traditional knowledge, on the other hand, also embraces traditional knowledge of plants and animals in medical treatment and as food. In this circumstance the discourse would shift from the environs of copyright to patents law¹⁶ and biodiversity rights.¹⁷ This shift is, in part, an explanation of the

⁹ '1967, 1982, 1984: Attempts to Provide International Protection for Folklore by Intellectual Property Rights', WIPO doc., UNESCO-WIPO/FOLK/PKT/97/19 (March 21,1997), 15.

¹⁰ WIPO doc, UNESCO-WIPO/FOLK/PKT/97/1 (March 17,1997).

¹¹ *Ibid.*, 3.

¹² Eg see Janke, 'UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural & Intellectual Property' (1997) 15 *Copyright Reporter* 104 at 109.

¹³ '1967, 1982, 1984: Attempts to Provide International Protection for Folklore by Intellectual Property Rights', WIPO doc., UNESCO-WIPO/FOLK/PKT/97/19 (March 21,1997), 15.

¹⁴ '1967, 1982, 1984: Attempts to Provide International Protection for Folklore by Intellectual Property Rights', WIPO doc., UNESCO-WIPO/FOLK/PKT/97/19 (March 21,1997), 15.

¹⁵ Eg, Puri, 'Copyright protection of folklore; a New Zealand perspective' (1988) XXII, No.3 *Copyright Bulletin* 18; Blain & De Silva, 'Aboriginal Art and copyright' (1991) 75 *Copyright Bulletin* 1; Blakeney, 'Protecting expressions of Australian Aboriginal Folklore under Copyright Law', [1995] 9 *EIPR* 442; Chengsi, 'On the copyright protection of Folklore and Other Legislation in China' (1996) 3 *China Patents and Trade Marks* 91; Puri, 'Preservation and conservation of expressions of folklore' (1998) XXXII No.4 *Copyright Bulletin* 5; Brown, 'Can culture be copyrighted?', (1998) 39 *Current Anthropology* 193.

¹⁶ Eg see Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous Peoples: An Australian Perspective' [1997] 6 *EIPR* 298.

¹⁷ See Blakeney, 'Biodiversity Rights and Traditional Resource Rights of Indigenous Peoples'

suggestions for *sui generis* solutions to the protection of traditional knowledge. Thus Simpson adopts Daes' view that it is inappropriate to subdivide the heritage of Indigenous peoples "as this would imply giving different levels of protection to different elements of heritage".¹⁸

TCEs in WIPO

The Phuket meeting was not followed by any legislative initiative from WIPO. At the most recent meeting of the IGC¹⁹ WIPO took the interesting position, following the promulgation of the WIPO Copyright and Performers Rights Treaties that international standard setting in the field of intellectual property was dependent upon national law. It pointed out that

As a rule, it is at the national level that right holders are recognized as having legal identity (or legal personality), that they are given standing to take legal action, and that they are considered entitled to be granted or to hold an IP right; and it is ultimately under national law that IP rights are legally recognized (though international arrangements can facilitate applying for rights, can facilitate their registration and recordal and in some jurisdictions can form the basis for rights directly exercised by individual right holders), and national legal mechanisms allow IP right holders to take action to restrain infringement of their rights and to secure other remedies such as damages. Contracts and agreements that affect the ownership, licensing and other dealing in IP rights are also concluded and enforced under national laws.²⁰

This then justified it in taking the position that,

the protection of IP associated with TK, TCEs and GR, whether through conventional IP rights, *sui generis* adaptations or extensions of IP rights, or through distinct systems of *sui generis* rights, therefore ultimately takes place at the national level. Any general approach to the IP protection of this subject matter, including its international dimension, necessarily entails consideration of what legal tools and mechanisms are required at the national level, how they should operate, and what legal and operational contributions the international dimension can make to protection at the national level. ...This is not to diminish the international dimension of IP protection, but to set it in a practical and operational context.²¹

Pursuant to this approach to national based approach to international norm-creation WIPO has launched a series of fact-finding missions In 1998 and 1999, it conducted fact-

¹⁸ [1998] 2 *Bio-Science Law Review* 52.
T. Simpson, *Indigenous Heritage and Self-Determination*, IWGIA Document 86 (Copenhagen, 1997), 55

¹⁹ March 15-19, 2004.

²⁰ WIPO Doc., WIPO/GRTKF/IC/6/6, para.6, Nov.30, 2003.

²¹ *Ibid.*, para 7.

finding missions to 28 countries “to identify intellectual property needs and expectations of traditional knowledge holders”.²² In 2001 a report was made available “to WIPO Member States, holders of TK, including indigenous peoples, the private sector, intergovernmental and non-governmental organizations, academic and research institutions and other interested parties, on the IP needs and expectations of TK holders expressed to WIPO during the [fact-finding missions] FFMs.”²³

The “Summary, Reflections and Conclusions” chapter drew broad conclusions on what were be considered to be the main and most prevalent IP-related needs and expectations expressed to WIPO during the FFMs by TK holders and others with whom WIPO consulted.

The main needs and expectations were:

- The selection of an appropriate term or terms to describe the subject matter for which protection is sought.
- A clear definition or description of what is meant (and not meant) for IP purposes by the term or terms selected.
- The adjustment of expectations through effective awareness-raising as to the role and nature of IP protection in relation to TK.
- The prevention of the unauthorized acquisition of IPRs (particularly patents) over TK by documenting and publishing TK as searchable prior art, where so desired by the relevant TK holders.
- An analysis of how prior art is established for purposes of patent examinations in the context of TK.
- Greater awareness-raising on the IP system, particularly among sectors of society and communities unfamiliar with it, such as indigenous and local communities and Governmental offices not directly involved in IP law and administration.
- Greater understanding by the IP community of the perspectives, expectations and needs of TK holders.
- Facilitation of dialogue and contact between TK holders, the private sector, Governments, NGOs and other stakeholders to assist in development of modalities for cooperation between them, at community, national, regional and international levels.
- Enhanced participation by the national and regional IP offices and the IP community at large in TK-related processes in which IP issues are raised.
- Study of the relationship between collectivity of TK and IPRs, more particularly testing of options for the collective acquisition, management and enforcement of IPRs by TK holders’ associations, including the applicability of collective management of IPRs to TK.
- Study of customary laws and protocols in local and traditional communities, including conclusions relevant for the formal IP system.

²² WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*. WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva, 2001.

²³ Ibid., 5.

The findings of the Report were “to be discussed with WIPO Member States and others with a view, particularly, to defining and guiding future WIPO activities on the protection of TK.”²⁴

An examination of these findings indicates that issues of TCE were subordinated to issues concerning TK. Apart from definitional matters, there was nothing much which could be used as the basis for an international convention to protect TCE.

In the shorter term, the findings of WIPO were also addressed to the issue of TK. Particular emphasis was placed upon the articulation of the IP system with tools to facilitate access to genetic resources: “the provision of IP advice and assistance in respect of legislation, regulations, guidelines, protocols, agreements (including model terms), policies and processes on access to and benefit-sharing in genetic resources and ...The development and testing, with the close involvement of indigenous peoples and local communities, of “best contractual practices”, guidelines and model clauses for contracts, as well as the provision of information on and protection against ‘unfair contract terms’”. It was also concerned with improving patent search facilities for examiners.

Because of the obvious conflict between needs and expectations WIPO took the position that it should not attempt “to mediate the needs or “resolve” conflicts, but rather to report as fully as possible on the information received from FFM informants.”²⁵ It concluded that the needs as identified “pose challenges for the entire IP community – national and regional IP offices, collective management societies, the private sector, NGOs, civil society, consumers, and the international community, including WIPO and its Member States.”²⁶ In this delicate political situation, WIPO concentrated its attention on technical issues, explaining that “it is more helpful to test the functionality of IP in relation to specific cases, than merely in a theoretical or ideological context”.²⁷ On the other it explained that “as the specialized United Nations agency responsible for the promotion of IP worldwide, WIPO is committed to continuing to address conceptual problems and undertake a practical and technical examination of the application of the IP system to various forms of TK in order to provide an informed and realistic analysis.”²⁸

The Conceptual Soup

The problems which WIPO has experienced in advancing the protection of TK and TCE is explained in part by the competing policy considerations which underlie this subject. The following are among the policy objectives of the protection of TCE and TK:

²⁴ Ibid., 6.

²⁵ Ibid.

²⁶ Ibid., 7.

²⁷ Ibid.

²⁸ Ibid.

- prevention of erosion and disappearance of traditions, i.e. the conservation of traditions;
- prevention of unauthorized exploitation;
- stimulation and promotion of innovation and creativity;
- protection from misappropriation, distortion and other prejudicial actions;
- protection and conservation of cultural and biological diversity; and,
- protection of the dignity and moral rights of traditional innovators and creators.

It is questionable whether the intellectual property system, which has evolved into a regime for the promotion and exploitation of industrial innovation, through the privatisation of that creativity through the conferral of property rights, is the best system for the achievement of these competing objectives. Certainly, the protection of the dignity of the custodians of TCE from the misappropriation of their culture and its distortion and misrepresentation, begins to move into the field of human rights. In any collision between human rights and intellectual property, the latter must yield. On the other hand, the assertion of the rights of traditional communities to the “look and feel” of their cultural artefacts and to the stories of their dreamings, begins to collide with western conceptions of human rights, such as freedom of expression.

The TRIPs Agreement represents primarily a US-led industrialised nations’ initiative in intellectual property norm-setting. It is unrealistic to expect the industrialised nations to initiate norm-creation in the fields of TK and TCE, since they are quite satisfied with the current international anarchy which reigns in these areas. WIPO, the UN’s specialised agency in intellectual property matters has chosen to vacate the field of norm creation in these politically sensitive areas, therefore it will be up to the source countries and source communities to develop their own international regime. Of course a particular problem will be to “operationalise” this regime. It is not likely, to be adopted as part of any TRIPs revision agenda and the hostility or apathy of the industrialised group of nations, will mean that it is not likely to find its way on to WIPO’s legislative agenda.

TCEs in UNESCO

The difficulties of action within WIPO and the WTO has permitted UNESCO to step into the vacuum. Member States of UNESCO in 2001 adopted the *UNESCO Universal Declaration on Cultural Diversity* and its action plan. This instrument recognized cultural diversity as the “common heritage of humanity” and committed UNESCO to “pursue its activities in standard-setting, awareness-raising and capacity-building in the areas related to the present Declaration within its fields of competence”²⁹ The first paragraph of the action plan recommended “taking forward notably consideration of the advisability of an international legal instrument on cultural diversity”. The Director-General in his preliminary study on the technical and legal aspects relating to the advisability of a standard-setting instrument on cultural diversity³⁰ proposed a number of options

²⁹ Article 12(c).

³⁰ UNESCO Doc., 166 EX/28, March 2003.

including a binding standard-setting instrument on the Protection of the Diversity of Cultural Contents and Artistic Expressions.

The elaboration of this new instrument, was undertaken in two stages: first three meetings of independent experts took place between December 2003 and May 2004 for preliminary deliberations with a view to producing a first preliminary draft convention along with a preliminary report. Secondly, From September 2004, a series of intergovernmental meetings were held in order to finalize the preliminary draft Convention and report. At these meetings a draft text for the convention was elaborated.

The preamble to the draft text included the following:

Affirming the fundamental right of all individuals and societies to share in the benefits of diversity and dialogue as primary features of culture, as the defining characteristics of humanity,

Being aware that cultural diversity, the common heritage of humanity, is a mainspring of sustainable development, and that it is thus as vital for humankind as biological diversity is for living organisms,

....

Recognizing the fundamental right of social groups and societies, in particular of members of minorities and indigenous peoples, to create, disseminate and distribute their cultural goods and services, including their traditional cultural expressions, to have access thereto, and to benefit therefrom for their own development,

Emphasizing the vital role of the creative act, which nurtures and renovates cultural expressions, and hence the vital role of artists and other creators, whose work needs to be endowed with appropriate intellectual property rights,

Being convinced that cultural goods and services are of both an economic and a cultural nature, and that because they convey identities, values and meanings, they must not be treated as ordinary merchandise or consumer goods,

The objectives of the Convention, were stated in Article 1 to include:

- (a) to protect and promote the diversity of cultural expressions;
- (b) to give recognition to the distinctive nature of cultural goods and services as vehicles of identity, values and meaning;
- (c) to facilitate the development and adoption of cultural policies and appropriate measures for the protection and promotion of the diversity of cultural expressions;

...

Article 7 of the Convention obliges signatories to promote the diversity of cultural expressions, declaring that:

1. States Parties shall provide all individuals in their territory with opportunities:
 - (a) to create, produce, disseminate, distribute, and have access to their own cultural expressions, goods and services, paying due attention to the special circumstances and needs of the various social groups, in particular, minorities and indigenous peoples;
 - (b) to have access to the cultural expressions, goods and services representing cultural diversity in other countries of the world.

2. States Parties shall also ensure:

- (a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;
- (b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

Article 8 imposes an obligation to protect forms of cultural expression which are “deemed to be vulnerable to or threatened by the possibility of extinction or serious curtailment”.

An interesting innovation, in Article 11 is the obligation on States Parties to “encourage civil society to assume its share of responsibility for the protection and promotion of the diversity of cultural expressions, and shall foster the participation of civil society in their efforts in this domain.”

UNESCO, WIPO and WTO

An important political issue is how the proposed UNESCO convention will fit into the TCE landscape, which is already occupied by WIPO and the WTO. This is sought to be addressed in Article 19, which provides two options:

Option A

1. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.
2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

Option B

Nothing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments.

It will be interesting to see how this turf dispute plays out.

Technical Annex

Article 4 – Definitions

For the purposes of this Convention:

1. Culture

“Culture” refers to the set of distinctive spiritual, material, intellectual and emotional features of society or a social group and encompasses in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

2. Cultural diversity

“Cultural diversity” refers to the manifold ways in which the cultures of social groups and societies find expression. From the diverse forms taken by culture over time and space stem the uniqueness and plurality of the identities and cultural expressions of the peoples and societies that make up humankind. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humankind is protected, augmented and transmitted to future generations, but also through the variety of cultural expressions which are borne by cultural goods and services, in all parts of the world at any given time, through diverse modes of production, dissemination, distribution and consumption.

3. Cultural expressions

The term “cultural expressions” includes both the notions of “cultural contents” and “artistic expressions”, and refers to the various ways in which cultural goods, services and other activities may communicate symbolic meaning or convey cultural values. The “cultural content” of such goods, services and activities refers to the meaning and values thus conveyed. The “artistic expression” of these goods, services and activities is a cultural expression resulting from creative work or aesthetic creation.

4. Cultural goods and services

“Cultural goods and services” (a non-exhaustive list of which is annexed to the Convention, see Annex I) refer to those goods, services and activities that embody or yield cultural expressions and have the following characteristics:

- (a) they are the outcome of human labour (industrial, artistic or artisanal) and require the exercise of human creativity for their production;
- (b) they express or convey some form of symbolic meaning, which endows them with a cultural value or significance distinct from whatever commercial value they may possess;

(c) they generate, or may generate, intellectual property, whether or not they are protected under existing intellectual property legislation.

5. Cultural industries

The term “Cultural industries” refers to industries producing cultural goods and services as defined above.

6. Cultural capital

“Cultural capital” refers to tangible or intangible items of cultural value or significance which are inherited from the recent or distant past, cared for in the present, and handed on to future generations. Items of cultural capital, being assets deriving from human creativity and resources, exist in the form of works of art, buildings and sites, customs and traditions, etc.

7. Cultural policies

“Cultural policies” refer to policies, whether at the local, regional, national or international level, which address or affect any aspect of the cultural expressions of an individual, community, or society, including the creation, production, distribution, dissemination of, and access to, cultural goods and services. (A non-exhaustive list of cultural policies is annexed to the Convention, see Annex 2).

ANNEX I

NON-EXHAUSTIVE LIST OF CULTURAL GOODS AND SERVICES

Cultural goods and services include, but are not limited to, goods and services in the following categories:*

Publishing, printing and literature: books, newspapers, periodicals, other printed matter, ebooks, e-magazines, etc.; services for the publication, distribution, dissemination and promotion of books, newspapers, printed matter, electronic publications, etc.; library services, etc.; royalties and licence fees;

Music and the performing arts: music recordings, musical instruments, musical compositions and publications, etc.; festivals, concerts, plays and artistic performances, dance, opera, orchestral music, songs,** other performing arts (circus, puppet theatre,** pantomime,** street performances, etc.), etc.; performing arts venues (theatres, concert halls, marquees, etc.); music and performing arts production, dissemination, operation and promotion services; royalties and licence fees;

Visual arts: painting (oils, drawings, engravings), sculpture, photography, photo-engraving, video art, computer graphics, graphic arts, electronic imaging; services for the production, dissemination, promotion and exhibition of visual arts; royalties and licence fees;

Crafts, design and architecture: ceramics, fabrics, embroidery, basketry, glass, jewellery, leather, wood, wrought metal work, metals, garments and accessories, furniture, interior decoration; designer objects; architectural services; services for the production, distribution and promotion of crafts and designs, etc.;

Audiovisual and new media: film, video recording, radio and television programmes, entertainment software (video games, educational programmes, etc.), Internet creativity sites, virtual reality, broadband video broadcasting (videostreaming),

etc.; radio and television services, radio broadcasting service, services for the production, distribution, operation, dissemination and promotion of film, video recording, and radio and television programmes; royalties and licence fees;

Cultural heritage:** antiquities, collectors' items, museum services, archive services (documents, recordings of items of the intangible cultural heritage, etc.), preservation services for historic sites and monuments; services relating to the safeguarding and transmission of rituals, narratives, folktales, etc.;

Cultural activities: sociocultural facilities, voluntary and community associations, recreational and sporting services, games, culinary traditions, costumes, cultural tourism, etc.

* As defined and adapted on the basis of the 10 categories of the UNESCO Framework for Cultural Statistics, UNESCO Institute for Statistics (UIS): <http://www.uis.unesco.org>.

** Certain cultural goods and services in this list are already covered by other UNESCO standard-setting instruments. However, such goods and services may be concerned by this Convention to the extent that spin-off products such as films, CD-ROMS, books, catalogues, etc. are brought into circulation. Among these instruments, one may note the Florence Agreement of 1950 and its Nairobi Protocol of 1976, the Universal Copyright Convention of 1952, the Declaration of Principles of International Cultural Cooperation of 1966, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, the Convention for the Protection of the World Cultural and Natural Heritage of 1972, the Recommendation concerning the Status of the Artist of 1980, and the Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, and other newly adopted conventions such as the Convention on the Protection of the Underwater Cultural Heritage of 2001 and the Convention for the Safeguarding of the Intangible Cultural Heritage of 2003.

ANNEX II

NON-EXHAUSTIVE LIST OF CULTURAL POLICIES*

1. Cultural policies are aimed in particular at:

Enhancing development by integrating cultural strategies into social and economic development policies: cross-sectoral policies and regional development programmes;

Supporting creativity and promoting participation in cultural life: urban cultural policies; policies that cater needs and aspirations of the young and elderly people;

Preserving and safeguarding tangible and intangible cultural heritage:** policies to recognize new heritage categories such as cultural landscape, industrial heritage or tourism; policies to inventory and register oral traditions and traditional performing arts, and improve scientific conservation policies; policies to protect buildings, sites, ensembles and landscapes of cultural significance in urban and regional development plans;

Promoting pluralism, cultural and linguistic diversity in and for the information society:

policies that enhance media pluralism and develop community, linguistic and minority services in public radio and television and on the World Wide Web; policies to digitalize archives, museums and libraries and facilitate access to that content; policies that educate and train children in the use of new media technologies; develop research on the relationship between culture and its dissemination in the media and through new communication services; promote cultural contents in formal and non formal education and the learning of mother tongues as well as of foreign languages (see Article 5 of the UNESCO Universal Declaration on Cultural Diversity);

Promoting culture among young people: enhance and enforce the rights of the child and vulnerable groups with special educational and cultural needs; encourage the young

generation to appreciate the existing diversity of contents and forms of cultural expressions, including expressions of the communities or peoples they form part of;

* This non-exhaustive list has been elaborated on the basis of the document *Cultural Policy for Development – Evaluation of the Stockholm Action Plan 1998*, prepared by Professor Jens Cavallin and Professor Tobias Harding from the University of Linköping (Sweden, 2003).

** Some of the cultural policies mentioned in the above list may be covered by other UNESCO standardsetting instruments. However, they might also be concerned by the present Convention, in particular to the extent that spin-off products such as films, CD-ROMS, videos, books, catalogues, etc. are brought into circulation.

UNESCO normative instruments referred to above comprise the Florence Agreement of 1950 and its Nairobi Protocol of 1976, the Universal Copyright Convention of 1952, the Declaration of the Principles of International Cultural Cooperation of 1966, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, the Convention for the Protection of the World Cultural and Natural Heritage of 1972, the Recommendation concerning the Status of the Artist of 1980, and the Recommendation of Safeguarding Traditional Culture and Folklore of 1989, as well as other conventions recently adopted such as the Convention on the Protection of Underwater Cultural Heritage of 2001 and the Convention for the Safeguarding of the Intangible Cultural Heritage, 2003.

Strengthening cultural industries: training schemes for national specialists, cultural administrators and managers; assisting artists, designers and craftspeople by safeguarding and improving the rights of creators;

Enhancing and supporting new and traditional media: support local/national production and distribution; develop innovative funding systems and foster the complementarity between public and private initiatives; support access to the new technologies;

Improving international cooperation and research for cultural policy: support developing countries to consolidate their cultural institutions and to train cultural professionals; encourage the development of civil society, professional and research networks; increase consultation and coordination among ministers of culture at the regional and international levels; develop comparable statistical data and indicators; and

Mobilizing more human and financial resources for cultural development: increase investment in cultural development; develop fiscal frameworks for cultural activities; promote business support for cultural development; develop public endowment and other revenue earning projects by cultural institutions.

2. To attain such objectives, cultural policies should cover, *inter alia*, the following areas:

Law, Administration, Finance: Legislation in the field of culture; financing of culture; improvement of socio-economic conditions for those engaged in the field of culture; framework for foundations and regulation of tax exemption; copyright; pension schemes for artists and freelancers; taxes for national and international artists; training for cultural administration; participation in culture for communities, groups and ethnic minorities; cultural decentralization;

Arts education: cultural and artistic education; supporting young artists; cultural education for children, youth and adults inside and outside school;

Cultural relations and exchanges: International relations in the field of culture; the running of cultural institutes abroad; exchange between groups and communities within States;

Cultural heritage: Cultural and natural heritage (tangible and intangible)**; involvement of the communities in heritage conservation**; information technology to preserve and sustain cultural heritage**; museums**; archives;

Fine Arts: Music; visual arts; theatre; sculpture; painting;

Traditional arts and handicraft: traditional arts; handicraft; basketry; weaving; ceramics; oral literature**; social and cultural traditions** (oral expressions, songs, dance, other traditional performing arts); fostering intangible culture**; rewarding living national treasures**; recognizing and rewarding living national treasures**;

Applied arts: Architecture; design;

Books: Libraries; book policy; publishing; public reading;

Media and Cultural Industries: Television; radio; mass-media; cinema; multimedia and network projects; the arts and cultural industries (film industry, books, music industry, on-and off-line publishing); games, animation; improvement of technical equipment of the cultural sphere; establishing of information banks and broadening the communication sphere; access for minority ethnic groups in the electronic and broadcasting media;

Community, recreation and sports: amateur culture; community culture; cultural centres; tourism, sports and youth; recreation;

Values: the development of an ecological conscience and the construction of a pluralistic citizenship; spiritual values and beliefs; languages; as vehicles of cultural values;

Research: The creative knowledges; research on contemporary materials; cultural investigation.