

# **Virtual Regional Seminar on Copyright and Traditional Cultural Expressions**

**Organized by the World Intellectual Property Organization (WIPO) in  
collaboration with the Mexican National Institute of Copyright  
(INDAUTOR) September 22 to 24, 2021**

SHARON B. LE GALL, PH.D.

Legal Consultant, Trinidad and Tobago

# Virtual Regional Seminar on Copyright and Traditional Cultural Expressions

Good Morning everyone. It is an honour to be your moderator for today's proceedings.

My introduction to the day's topics will include a brief overview of the following

- Some preliminary comments about the characteristics of traditional cultural expressions (TCEs)
- Emerging protection for traditional cultural expressions (TCEs) in international law from the 1970's - initial copyright attempts at protection (Berne Convention, Tunis Model)

# Virtual Regional Seminar on Copyright and Traditional Cultural Expressions

- Ongoing attempts to protect traditional cultural expressions (TCEs) – laws inspired by copyright law (Model Provisions -1980s), IGC Draft TCEs Provisions - 2000s)
- Questions for policy makers and advocates for protection of traditional cultural expressions
- Non- legislative activities

# Preliminary Comments - Characteristics of Traditional Cultural Expressions

- Origin traced to a particular People, group or community described as “indigenous”, “traditional” or “cultural” with the possibility that the traditional cultural expression (TCE) could be traced to a country.
- Shared by more than one “indigenous”, “traditional” or “cultural” group or held by the same group across geographical boundaries.
- Link between the traditional cultural expression (TCE) and the identity of the source group or country.

# Preliminary Comments - Characteristics of Traditional Cultural Expressions

- Has collective characteristics, recognising that there may be traditional cultural expressions (TCEs) associated with groups within groups or individuals within group.
- Oral in nature and transmitted by oral means as well as documented.
- Passed or handed down from generation to generation.

# Preliminary Comments - Characteristics of Traditional Cultural Expressions

- Maintained in a “traditional” context, according to custom or maintained by non-traditional means or through “conventional” educational institutions

# Traditional Cultural Expressions and Copyright Comparisons

Traditional cultural expressions (TCEs) assume many forms which mirror or are analogous to categories of works protected by copyright law namely

- Literary works
- Musical works
- Artistic works

# Emerging Protection for Traditional Cultural Expressions in International Law (1970s)

Initial copyright attempts at protection

Historically, the first attempt to utilize copyright law to protect traditional cultural expressions (TCEs) was the Berne Convention for the Protection of Literary and Artistic Works (1886) (the Berne Convention) amended by the Paris Act in 1971 (Article (4) (a) which provided protection for “unpublished” works of “unknown authors” where a designated competent authority shall be entitled to protect and enforce those rights”.

# Emerging Protection for Traditional Cultural Expressions in International Law (1970s)

Initial copyright attempts at protection

Article 15(4)(a) provides as follows:

“In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he 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 be entitled to protect and enforce his rights in the countries of the Union.”

# Emerging Protection for Traditional Cultural Expressions in International Law (1970s)

Initial copyright attempts at protection

Another development in the 1970s was “The Tunis Model Law on Copyright for Developing Countries (1976)” (The Tunis Model).

The Tunis Model Law was essentially “copyright legislation” amended to accommodate the peculiar characteristics of traditional cultural expressions (referred to as “folklore”) and overcome some challenges posed by using copyright legislation.

Folklore was not required to be fixed in material form or original, it is recognized as collective in origin and is protected for an indefinite period of time.

# Ongoing Protection for Traditional Cultural Expressions in International Law – Copyright inspired Model Laws (1980s)

- Another development in the attempt to provide protection for traditional cultural expressions (TCEs) (this time by model legislation inspired by copyright law) was the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1982) (1982 Model Provisions)
- These Model Provisions are based on copyright principles but deal with protection of folklore as a separate issue and not as a category of copyrightable works in conventional or modified copyright legislation. Protection against specified uses without authorization is also provided without limitation in time.
- Some countries have adopted the Tunis Model Law while others have adopted or incorporated aspects of the 1982 Model Provisions in their copyright law.

## Ongoing Protection for Traditional Cultural Expressions in International Law – Copyright inspired draft laws (1999 onwards)

- Another significant development was the WIPO Fact Finding Missions conducted in 1998 and 1999 (as well as subsequent missions) to determine the intellectual property needs and expectations of holders of traditional knowledge
- Subsequently, there was the formulation of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) in 2000 which produced draft provisions on traditional knowledge protection and the protection of traditional cultural expressions among other documents.

# Key Policy Questions to Consider “What”- “Why”- “For Whom” – “How”

- Subject matter protected (“What”)
- Justifications/objectives for protection (“Why”)
- Beneficiaries (“For Whom”)
- Scope of protection (“How”)
- Sanctions and remedies (“How”)
- Management of rights (“How”)

# “What”

## Defining Traditional Cultural Expressions

Traditional Cultural Expressions (TCEs) can be defined **descriptively** and **conceptually**, and national laws have adopted both approaches

### *Descriptively*

- folksongs
- stories
- music
- dance
- drama
- festivals
- rituals

This is not an exhaustive list.

# “What”

## Defining Traditional Cultural Expressions

### *Conceptually*

Conceptually, what is common to most, if not all, definitions of traditional cultural expressions (TCEs) are

- the origin of the traditional cultural expression (TCE) traceable to a particular people, group or community
- the collective characteristics of the traditional cultural expression (TCE)
- the oral nature of traditional cultural expressions (TCEs) and its oral transmission
- the intergenerational nature of the traditional cultural expression (TCE)

# “What”

## Defining Traditional Cultural Expressions

- The importance of context in defining traditional cultural expressions (TCEs), for example, the social, cultural and performance contexts is implicit (and at times explicit) in some definitions.
- The linkage of traditional cultural expressions (TCEs) to the identity of the source group or community is implicit (and at times explicit) in some definitions.

# “Why” Justifications for Protection

- Preservation of cultural diversity/protection of cultural identity”
- Prevention of misappropriation of traditional cultural expressions
- Equitable sharing of benefits from use of traditional cultural expressions
- Respect for “other” forms of cultural expressions and parity with literary, musical and artistic works typically protected by copyright law

# “For Whom” Beneficiaries

This could be defined in broad terms and can include options for individual, community, country and regional beneficiaries, where appropriate

Possible beneficiaries may include:

- indigenous communities
- traditional communities
- local communities
- religious communities
- individuals
- States

# “For whom” Beneficiaries

Beneficiaries may be identified based on

- cultural affiliation with a relevant group or geographic location or origin
- their responsibility for maintaining and transmitting traditional cultural expressions
- their designation as custodians of traditional cultural expressions (TCEs)

Criteria may be prescribed in customary laws and/or national laws.

# “How”

## Scope of Protection

- Provision of a general right to prevent use of the traditional cultural expression (TCE) without authorization (that is, without the prior informed consent of the relevant source community)
- Right to equitable benefit-sharing
- Right to be identified as the source of the traditional cultural expression
- Right to prevent the distortion of the traditional cultural expression

# “How”

## Sanctions and remedies

This may include a range of

- civil and criminal remedies
- administrative sanctions such as fines
- public apology

# Non-legislative Activities

There are other non-legislative interventions that support legal protection of traditional cultural expressions, for example

- Continued engagement with communities
- Documentation of traditional cultural expressions with the necessary cultural and ownership safeguards
- Documentation of unauthorized use of traditional cultural expressions (commercial and otherwise)
- Awareness-building exercises regarding the value and use of the copyright system

# Non-legislative Activities

- An audit of legal and non-legal resources in copyright and the protection of traditional cultural expressions
- Development of a database of copyright and traditional cultural expressions laws (enacted and proposed)

Thank you for your attention