**GENERAL DISCUSSION ON SUBSTANTIVE MATTERS BASED ON CURRENT LAW RELATING TO Nordic indigenous TK&IP**

*The aim of the ongoing work is to enable a dialogue between experts of Sámi TK (traditional knowledge)/TCE (traditional cultural expressions) and experts in IP from the Nordic countries. The narrative of the IP subgroups is maintained in blue, allowing still food for thought to incoming meetings. The basis for the discussion should be the work that has been undertaken among the Sámi in recent years (under Sámi parliamentary Council, SPC), building on the studies made in Finland and Norway collected on the [Dialogue Portal](https://minedu.fi/en/project?tunnus=OKM057:00/2020). A common pan-Sámi approach on the needs for IP protection and solutions from indigenous perspective would provide a good basis to work on. The first meeting on May 25 focused on options under current IP law to protect some Sámi TK/TCEs. A general state of play on work done under the SPC was presented at the IP subgroup on June 1 that continued to discuss the gaps, which elements do not exist in the system and how they should be addressed (as below). The third meeting started with highlighting the relationship between this dialogue between the Nordic experts and the on-going negotiations. While it was clear for everyone who have participated in the discussions that there was no link with this work and the IGC negotiations on an international instrument on the protection of GRs, TK and TCEs at WIPO* ***but a clarification*** *on the Dialogue portal was in order to enable comfort in the dialogue to continue.*

*The meeting on 28 September made an in depth dive into the rights based approach suggested in the IMKÁS-study. The texts in black are real issues raised at the expert seminar often by Sámi in 2020 and the suggested “possible measures” have been subject of discussion at the IP subgroup to address them.*

**COPYRIGHT**

**Gákti** *– Sámi traditional dresses*

* Exploitation of Sámi clothing could in theory be prevented with measures related to section 53 of the Finnish Copyright Act (protection of classics)

DISCUSSION:

The study commissioned by the Ministry of Education and culture in Finland ([Needs of the Sámi for IP protection, Tuomas Mattila, University of Helsinki, 2018](https://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_yfb_19/wipo_iptk_yfb_19_ref_needs_sami_for_ip_protection.pdf)) contained a suggestion to look into the possibilities of the current IP system, specifically the “protection of classics” that provides protection even if a work whose term of protection has ended is treated in a demeaning/ offensive way. The protection would be piecemeal, not a holistic solution, but it could work as a deterrent to offensive uses by third parties. As a first step, without any particular offensive or infringing case as such in sight, an opinion could be asked from the Copyright Council in Finland, whether or not a certain Sámi TCE, such as a certain model of a Sámi dress, should be considered as a “work” in the meaning of a copyright law, and would it therefore be protected by Section 53 § of Finnish Copyright Act (protection of classics). Even if the opinion of Copyright Council is not legally binding, it would clarify the prospects, whether, further on, in a case of an actual offensive use of a Sámi dress, this Section in Copyright Act would be applicable. The benefit of this clause is, that in Finland there would not be a need for the Sámi to take the issue to court but the Ministry of Education and Culture could decide, as a first instance, taking into account the opinion of the Copyright Council, whether a use of a certain TCE is considered as violating cultural interests. This decision should take into account expert opinions on the issue of cultural interests deposited in Sámi dress (or any other TCE in question). Even if a third party against which such decision on behalf of the Ministry of Education and Culture would be taken, based on Section 53 of Finnish Copyright Act, prohibiting such use of a Sámi dress (or any other TCE) that violates cultural interests, would challenge this decision in court, the defendant in a possible litigation would the Ministry of Education and Culture, defending its decision made on the basis of Section 53 of Copyright Act, and not the Sámi representatives.Altogether, in Norway, Sweden, and Finland, there very limited experience of the application of the provisions on the ”classics protection”.

The experts discussed this option and its possibilities and found that there are differences in the Nordic laws on how protection of classics is applied and to use this option covering Sámi TCEs would probably require amendment of the law. In Sweden, following the case related to neonazi propaganda linked with classical works was not considered to have been put in a demeaning context, the main reasoning being that the works were not altered in this context. The custodian of the system in Sweden (Swedish Academy) will be changed and one option could be that the IP Office would take over this task. In Norway there has only been a few cases and none recently. The Council of the Wise does not exist anymore so the system is not properly working at this moment. It should be noted that a decision on the nature of a particular use under protection of classics would not be a statement on ownership of the TCE. There are ethical guidelines relating to use of Sámi culture in tourism that could guide the interpretation.

The Sámi representatives considered that while this option is interesting it could not be an over encompassing solution. One specific problem is that it would not provide protection to dynamic TCE’s and it could be difficult to predict the result of the government. It would neither provide the Sámi themselves the power to decide on the use of their TCEs. Although the system had not been developed for protecting TCEs, the world has changed in so many ways, it could be a good time to reconsider the possibilities under it. Discussion continues on this option whether this option could be one that the Sámi collectively would like to pursue.

***Sámi yoik, livdde, leu’dd (luohti)*** *- Sámi traditional singing*

What is the ole of Teosto and other organisations, museums/archives on IP related use, education of creative community about the use of yoik in songs etc.

* There are tapes with *luohti* in the collections of archives of European museums and universities that anyone can use. In Finland there is no solid base that inform about the contents of the archives. Every archive has its own regulations for listening or use. Profound understanding of the Sámi culture is needed in order to understand the content. Sámi artists use the archives to use old recordings when making music, new “luohti”.

DISCUSSION: It was mentioned that the customary way of providing ownership to yoiks, and other traditional types of singing varies a lot between the cultures of Sámi regions. Most common is the fact that the when a person is subject of the yoik (luohti ?), she/he is the owner of it and should decide on its use (very personal). There are old and new pieces of traditional Sámi music in the archives and a common approach would be needed for the treatment of it to ensure revitalization of the music tradition.

POSSIBLE MEASURES

- Could there be similar ethical guidelines formulated for a systematic way to treat TCE’s like yoiks in the archives? Could access to TCE’s in the archives be facilitated with ECL (extended collective license) according to the Copyright Acts?

- Could more structural support/education be provided for traditional Sámi musicians and a forum to discuss and get collegial and professional help in issues also related to copyright matters? Normally copyright organisations know concepts like the composer, the lyrics, the producer and so forth. But they are not familiar with the object in the luohti, they do not comprehend that contemporary and old luohti are collectively owned by Sámi families.

**TRADEMARKS**

**Gákti** *– Sámi traditional dresses*

Safeguarding TK/TCEs is a way to transmit common central Sámi values that are holistic values, including language, your relatives, understanding nature, the luohti and the total way of life connects these together. When it is the main livelihood, it is expected to provide income and food on the table; as an additional livelihood it is an important way to activate the community; Sámi languages are endangered and so is duodji. In total there are only a few in these groups that has the capacity to make duodji. Threats are cheap copies and also the “race” to use “Sámi identifiers” is a challenge as symbols of the culture are very attractive to people coming from the outside the Sámi society.

* Sámi duodji trademark is held by the Sámi Council, there is the old sign describing traditionally made Sámi Duodji by a Sámi and another sign for handicrafts by Sámi that are not necessarily traditional
* TCE’s as trademarks: are they distinctive? Who would own the mark and decide upon its use?

POSSIBLE MEASURES

* Ethical guidelines for the IP Offices to assist companies seeking trademarks with symbols relating to the Sámi? What could they contain?
* More education on Sámi duodji trademark for the entrepreneurs of Sámi homeland areas?

DISCUSSION:

The collective Sámi Duodji trademark has been existing for some time and it has recently been updated and developed to contain even a specific mark for products that are made by Sámi artesans (and sold in Sámi Duodji shops) but that are not genuine Sámi Duodji (the materials or work methods, or patterns differ).

Discussion went on to tackle whether TCE’s a such could be protected as trademarks. For instance, the blue and white stripes of Mother Theresa’s dress were registered as trademark in order to protect against use in demeaning contexts. Doubts were expressed concerning applying trademarks to the gákti (as a whole). The traditional Sámi dresses could have features that would be distinguishable in a way that would protect against cheap copies made in China. Discussion continues on this aspect.

A possibility of supporting the IP Office with an advisory board on TK/TCE related application was also addressed positively (following experiences of New Zealand). On the other hand, the fact of having one people living in the jurisdictions of four countries could provide problems.

**THE WORK PROGRAM OF THE SAMI PARLIAMENTARY COUNCIL AND PAN-SÁMI VIEWS ON TK/TCE**

The study commissioned by the Ministry of Education and Culture referred above from 2018 raised a few questions that needed to be addressed in a pan-Sámi context relating to the need for legal certainty in the IP system including a definition of the subject matter to be protected under the IP system. This would include dialogues to address also sociological consequences of the protection and the need to form strategical approaches for the use both within the communities and for third party uses. The reason for this is to enable solutions to emerge and avoid problems with identification of the elements containing Sámi IP in the future.

- It is important to understand the **state of play of the internal discussions among the Sámi** principles of acknowledgement, participation and pan-Sámi views

1) what kind of solutions are being formed, what kind of aspects have been discussed eg. Disney process on Frozen II

2) there are already some guidelines available -> how are they being used, have they proved functional?

The IMKÁS pre-study “Ownership of Sámi intangible cultural heritage (ICH)” was presented by the Sámi Parliament in Norway that had been made from March 2020 to March 2021 and had been made with view to begin finding common ground and structures to support a Pan-Sámi view to addressing in practice elements of the Sámi culture that are TK and TCEs. The work program of the Sámi Parliamentary Council (SPC) contained a 3-year work plan on TK with multiple goals but the pre-study focused on ICH in order to find common approaches that might be extended to other areas. There had been discussions on administrative and parliamentary levels and also the NGO Sámi Council had participated in the work (established in 1956, the oldest indigenous expert body with specific units for human rights, arctic, environment, culture and EU).

The work was based on human rights and constitutional rights in Finland, Sweden and Norway to Sami culture and the UNDRIP article 31 on the right to IP over TK and TCEs. The main approach is that the Sámi assume the rights to their culture (Matthias Åhrén) in contrast to just relying on the willingness of third parties to acknowledge the sensitiveness of Sámi TK/TCE. An important notion from the pre-study was acknowledging the need to clarify internal needs and values related to Sámi TK&TCEs. This step was important in order to then see how existing mechanisms could be used to address these needs.

The TK and TCEs are intangible “properties”, “resources” or “assets” of Sámi and include among others the gákti and yoik that were discussed earlier but also many other types of subject matter, like the Sámi names, reputation, use of languages in commercial context etc. The values vested in Sámi TK&TCEs are the cultural identity of the Sámi, the huge economic value in instances where the TK/TCE forms part of a traditional Sámi livelihood. There was a need to set up legal rules or a legal order that would acknowledge and address the different levels of ownership including the collective level to Sámi intangible cultural heritage in accordance with indigenous legal structures. The risks of cultural appropriation were found severe and could cause cultural erosion and lack of identification with those elements, loss of income to the Sámi but also the support culturally extractive industries. The internet increases the use by third parties. Addressing only “sensitiveness” of TK/TCEs is not enough but a rights based approach is needed.

There has been developments from third party point of view in these matters following worldwide initiatives such as “black lives matter”, or corporate responsibility strategies and laws. Companies have started to address needs of indigenous peoples in the use of cultural elements. However, the assessment for “sensitiveness” is made from third party perspective and does not automatically correspond to the view taken by the holder of the TK/TCE.

The study also collected available ethical guidelines and other types of policy or other structures developed by the Sámi people in the Nordics. The Sámi Parliament in Finland has developed ethical guidelines for research in Sámi culture and [tourism using Sámi cultural elements](https://www.samediggi.fi/ethical-guidelines-for-sami-tourism/?lang=en), the Sámi Parliament in Sweden has formed policy documents to address TK and the use of it by third parties. Finally in Norway guidelines has been developed for research in Sámi medical practices (and soon perhaps also relating to tourism). There are also legislation to protect Sámi genetic resources and associated TK in Finland and Norway that could work as basis. The OECD have assessed the needs of the Sámi in TK protection, the Sámi film industry have published ethical guidelines and there is a Committee on Sámi symbols and yoik in place (in Norway). The Saami Council is a relevant body who has done a lot of important work to be considered. A lot of work and effort has taken place on the Sámi side without major significance.

The study found also that the issues require more in depth capacity building internally within the communities. There were many Sámi duodji practitioners and artists in need of support in how they can use TK/TCEs and protect it considering its collective nature. For instance in context with the case in Norway on the Sun symbol there was a dialogue with the IP Office.

The Sámi parliaments would need to take a clear stand and clarify roles, mandates and structures to address the use of Sámi TK/TCEs based from the experiences with Frozen II/ Disney. The need for a coordinated approach was considered vital.

The representatives of the Sámi stressed firstly that the indigenous point of view on needs of IP assumes the rights to Sámi TK/TCEs exist already. This approach could include also the “sensitiveness” approach or ethical guidelines etc. It differs from the western views of rights to ownership but assessing it or defining it is not much different in practice than an “IP audit” of a corporation. Secondly, it is important to acknowledge the difference between a rights - and “sensitivity” based approach, the latter always being based on a third party view of the sensitiveness. Thirdly, there is a need for formalized knowledge about TK/TCEs internally among the indigenous people, as there is not enough in depth knowledge about various key points related to use and management of TK/TCEs, nor opportunities for dialogue to express the point of view by the Sámi, which is linked to the first point.

DISCUSSION:

The participants of the IP subgroup welcomed the presentation on pre-study “Ownership of Sámi ICH”. The point of view was welcomed and considered by the chair a political one. As had been previously mentioned, the approach chosen for the Finnish Presidency of the Nordic Council of Ministers was broader than just substantive IP, covers also work on political and practical levels. A political level is the rights the Sámi have under the constitutions and other laws in respective country with Sámi inhabitants. Finland has also recognized the need to work on a practical level to improve the mutual co-operation and the increase of understanding within and between the Nordic countries on Sámi TK/TCEs to be able to address the needs in dialogue.

It was discussed whether the Sámi point of view based on assumed rights would be a political issue or not. The Sámi representatives felt it was just a practical way of addressing issues in dialogue, a few IP experts felt that it had a political nature especially to the extent it referred to the Sámi right of self-determination as an indigenous people. In a cross-border context, a rights-based approach would be of political nature, as legal systems that address indigenous peoples’ rights and also in fact IP rights are national and provide rights within that jurisdiction.

3) what issues **need further work:** Needs of the Sámi for intellectual property protection from 2018 asked if clarity could be found on:

- What is being protected?

- Against whom or what is protection sought?

- What is the content of the protection?

- Who has authority to manage the protection and can grant permission for use of the right?

- Who has the right to the benefit from the protection and use of TCEs?

To a posed question about whether the study brought more clarity to the legal concept of ownership of TK/TCEs and if so, of what nature, it was noted that among the Sámi ownership relating to particular TK/TCEs are very clear. The boundaries are then set by conflicts and negotiations. So the issue whether it is possible to distinguish in each case which TCEs are protected and against which kind of uses, one should compare whether this type of assessment is required in other areas of IP? A representative of the CMO for reproduction in Finland supported the point of view that neither can the issue what is protected by copyright or how, be defined clearly in the system. The actual boundaries of the protection are often found only after conflict and negotiations between representative parties. The question of who would be representative is a relevant question too. The legal clarity needs to be in place at least for (core element, second layer, ethical etc.) in the agreements.

The need to define structures for collective representation of the Sámi in the instances relating to use by third parties was seen as the most important finding of the study. Forming a collective to represent the Sámi is important as no individual can (or has the required knowledge) by themselves to express the view of the Sámi. It was also considered important for indigenous practitioners and artists to be in contact and form a dialogue with the respective IP Offices in the Finland, Sweden and Norway to get the best assistance in IP matters. This would help to raise awareness on the needs to stop infringing uses of TK/TCEs in IP Offices and to form basis for ways to recognize and respect the rights of the Sámi in their TK/TCEs. It would also clarify the concept of the “public domain” which is often misunderstood. Discussion will continue as we approach the conference in November.

The meeting on 28 September provided an opportunity for a more in depth look into the rights-based-approach of the IMKÁS-study and reflections on what the approach would mean from IP perspective. At the outset, it was noted that the IP rights system is a rights based approach to subject matter regulated under IP laws. This type of rights do not exist for TK and TCE’s in the IP system. The term “ownership” was, however, also used in the study and could be considered further to dismantle what it contains. In the UNDRIP article 31 first line, it is said that indigenous people have the right to “control” their IP. This leads to the applicability issues of existing other legislations, including the UNDRIP itself which is a political declaration, non-binding as a legal instrument but containing legal content that the majority of UN Member States have approved. The constitutions of Finland, Sweden and Norway confirms the status of the Sámi in quite similar ways, although with differences. They do not declare any rights to culture but require that governments provide circumstances that are needed for the Sámi to be able to develop and maintain their language and culture. In Finland there is an emphasis in the Constitution on them “as an indigenous people” (in the Swedish Constitution of 2010 there is a same kind of emphasis of the Sámi as “the Sámi nation”). It was highlighted that such an addition brings the indigenous rights such as self-determination and right of participation into the forefront. There are further legal acts that provide more detailed provisions about how the government must protect Sámi language and culture. Other constitutional rights are right of ownership and right to take part in societal life which are also relevant in this context, for individuals. The existing frameworks could be analyzed further from this angle. For instance, it was noted by one expert that if there is a recognized ownership for the Sámi as a people in relation to their culture, there should be an ownership of culture for Finns too. The chair invited participants to provide comments either immediately and in any case in written form after the meeting.

The discussion continued with suggestions to analyze ownership also using a copyright collecting society’s point of view, instead of putting a political and a legal analysis against one another. Rights as substantive means provided by law belong to individuals. A society that represents authors can provide licenses but it can also develop guidelines and best practices. The collecting society Sámi copya has been established and it could be interesting to hear what kind of a role and approach they have in these discussions. It was noted that there had been previous attempts to reach a representative from the society without success.

As far as new rights are concerned the “equality test” that is always made by the parliament when legislation is developed. Good definitions of the subject matter and rights benefit the legal certainty and also enforcement of the right (in practice). Also, as was mentioned before, the rights are normally always put in relation *i.e.* against whom they are enforceable such as the “state”. The right can belong to an individual but also to a group of individuals.

Comments and insights were well received by the indigenous representative, who noted that the basis of the approach in the study is a common one, but the cases and examples are presented one by one. A long journey was ahead to clarify all different aspects and one important one was the suggestion in the study to have a common a Pan- Sámi body to provide information.

Another proposal was made to tackle the rights based approach which provided a right of respect of the ownership/ stewardship of Sámi culture. This type of approach was used for protection of religions. It could be built from the general provision in the IP laws – the right of respect. This approach could support the application of existing ethical protocols developed by the indigenous peoples (referred extensively across Sápmi in the IMKÁS-study).

A right of respectful treatment of Sámi culture could be a model that fits with the UNDRIP 31 which states that the indigenous peoples “have the right to maintain, protect and control” their IP. The second para of the article states that “In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.” *i.e.* a similar process now introduced by Finland in the Presidency initiative.

In relation to any other existing IPs that might work as a partial solution the non-agri GI (geographical indications) were briefly discussed. There was a suggestion to bring them up in the conference as a possibility to protect some forms of TCE’s and TK. It was considered that for the Sámi a distinct geographical area with specific similar or same knowledge and expressions could be harder to agree upon as the same area was inhabited by also non-indigenous people. Greenland on the other hand could perhaps benefit from the protection but that it would be a matter for them to take a stand on it. As non-agri GI’s were considered as a future form of IP protection and because none of the Nordic countries (with a trademarks’ approach vs. old world approach) was enthusiastic of introducing such a regime, it was left for the future meetings of the Nordic dialogue. Taking a stand on this issue could confuse the on-going negotiations on this issue both on EU and on international fora.

**SPEAKERS AND IP-ASPECTS TO BE DISCUSSED AT THE CONFERENCE, INCLUDING GOALS**

The speakers and the topics are most important in the conference, the length of each element is crucial to ensure that the main messages come through. The approach – political, practical and substantive levels of work is to ensure that the increased co-operation in the Nordics will take place on all relevant levels and strengthen the engagement.

The Sámi would have a key note in each element of the panel session, and there could be 1-2 commentators from different points of views, addressing the viability, possible challenges and needed next steps.

The timing of the Conference will be difficult, as the elections of the Sámi Parliament in Norway and also the Parliamentary elections in Norway are in September. This means that the preparations need to take into consideration both in relation to the Conference and to assess the possibility to continue with the topic on the agenda of the Norwegian Presidency of the Nordic Council of Ministers.

DISCUSSION:

The Conference program will be addressed in the Nordic team meetings on June 10 and 7 September. Everyone is welcome to join the discussions. Any suggestions for speakers are also welcome to be added to the program based on the agreed approach that the discussion in the Conference will be based on the findings of the work by the Sámi Parliamentary Council reflecting also the view expressed in the subgroup on IP and ICH.

The program was agreed following the week of 7 September but the subgroup discussions among experts will continue to be refined towards the Conference. Inviatations were sent out usinf the Save the date –model on 24 September.

The below issues is planned to be dealt with in social media marketing of the Conference.

**How to present the topic in the invitation** in an attachment on

* **practical examples**, basics, **background, high level. actions – various angles,**
* **business aspects** – new ways of doing business
  + recent developments, trade names of ice creams repelled, sports, Sámi sun symbol; encourage use of symbols but ensure respect

**Copyright & trademarks**

- Role of SPC in IP related matters, education & awareness on IP rights for indigenous?

**Options for short term goals (practical)**

* + What kind of short term goals could be achieved?
  + Common studies or workshops to be organized to involve the policy officers of IP Offices and ministries of the Nordics (NB! WIPO TK workshop)

There is also a possibility to organize a WIPO practical workshop on Intellectual Property, Traditional Kknowledge and Traditional Cultural Expressions for Nordic Countries next year where issues continue to develop.

The aim of the Workshop is to: Foster cooperation between government officials from different departments and IPLCs, within each country and between countries of the same region; Impart deeper knowledge of the main principles, systems and tools of the IP system and how they relate to IPLCs, emphasizing both the potential value that IP could bring in support of TK and TCEs protection, as well as the challenges; and Facilitate country-level exchanges and exchanges on experiences and best practices relevant to the protection of TK and TCEs.

**Options for long term goals (political)**

Increased and systematic co-operation in the Nordics to find common solutions**The text relating to a possible common position within WIPO-IGC is deleted as there is no direct link with these dialogues and the negotiations at WIPO-IGC but positions are developed in a different process.**

***….TO BE CONTINUED***