

## **Safeguarding Intangible Cultural Heritage and Protecting Creativity: Practical Mechanisms for Complementarity**

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### **Draft Paper prepared for the Sub-regional Experts Meeting in Asia on “Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies”**

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#### *Executive Summary*

Museums, archives, libraries, anthropologists, art historians and ethnologists play an invaluable role in preserving the rich cultural heritage of our planet.

Intellectual property (IP) issues arise at every stage of the collection, cataloguing, inventorying, recording, presenting, conservation and re-use of cultural materials by such cultural institutions and specialists.

Certain specific questions arise in relation to the protection of traditional cultural expressions and knowledge. Indigenous peoples and other traditional communities express concerns that sometimes activities by museums and cultural specialists do not take adequate account of their rights and interests, and that documenting and displaying, say, a traditional song or a tribal symbol, make them vulnerable to misappropriation. In other words, the very process of *preservation* of traditional cultural expressions can trigger concerns about their lack of legal *protection* against misappropriation and misuse.

In response to a widely felt need for technical advice and a sharing of experiences on these issues, the World Intellectual Property Organization (WIPO) is undertaking a project, with the involvement of all stakeholders, aimed at developing IP-related practical guidelines and “best practices” for cultural institutions and specialists engaged in collecting, inventorying, preserving and making accessible cultural heritage materials. This project is a practical complement to the ongoing discussion of *sui generis* approaches to the protection of traditional cultural expressions and knowledge taking place at WIPO.

Raising IP questions is not intended to complicate but rather complement and support the activities of cultural institutions. Clarifying IP issues and options could contribute to realizing the promise of promoting creativity and economic development, museum and archival services, scientific and scholarly progress and educational opportunities. Indeed, cultural institutions could play a key role in both preserving cultural expressions and protecting them against misappropriation and misuse.

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<sup>1</sup> The views expressed in this paper are not necessarily those of WIPO or any of its Member States. The paper is still in draft form and would benefit from comments and inputs from participants in this Experts Meeting.

## *I. Introduction to WIPO and Intellectual Property*

1. The World Intellectual Property Organization (WIPO) is the United Nations agency responsible for the promotion and protection of creative intellectual activity and for facilitating the transfer of technology in order to accelerate economic, social and cultural development. It has 183 Member States, who decide on, direct and monitor its program activities.

2. Intellectual property (IP) protection refers to the protection of the results of creative intellectual activity against misappropriation and misuse. IP systems are diverse in character, but they generally aim at giving the originators of intellectual works a say over whether, and if so how, their works are used by others, at providing for acknowledgement and respect for originators, and appropriately sharing the benefits of use of their works - so addressing both economic and cultural interests.

3. IP protection may take the form of exclusive property rights (such as certain rights in copyright or patents) or non-proprietary measures, such as equitable remuneration schemes and moral rights in copyright; protection against consumer deception and unfair competition through the protection of trademarks, geographical indications and national symbols and the law of passing off; and protection against the disclosure and misuse of confidential information.

4. IP protection does not oblige the commercial exploitation of creative works, but rather offers a range of options for creators who may wish to disseminate their creative works, and safeguards against misleading attribution and deception of the public in the marketplace.

5. “Protection” in this sense is distinct from but complements the concepts of “safeguarding”, “conservation” and “preservation” in relation to cultural heritage, traditions and ways of life.

6. The work of WIPO is complementary to legal instruments and developments in other policy areas and takes into account the work of other relevant intergovernmental and non-governmental processes.

7. WIPO welcomes the holding of this Experts Meeting, organized by the Asia-Pacific Cultural Centre for UNESCO (ACCU) and the Office of National Culture Commission (ONCC), Thailand, and is pleased to participate in it.

### WIPO’s work on the protection of traditional knowledge and cultural expressions against misappropriation and misuse

8. WIPO first began examining the relationship between IP and the protection, promotion and preservation of traditional knowledge (TK) and traditional cultural expressions/expressions of folklore (TCEs) several decades ago, often in cooperation with UNESCO.

9. The relationship between IP and TK and TCEs is the subject of active policy development, norm-building and capacity-building programs at WIPO. Policy development

and norm-building take place mainly within the scope of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Intergovernmental Committee).

10. WIPO Member States have called for accelerated progress in this area, stressed the “international dimension” of these questions and emphasized that no outcome of WIPO’s work in this area is excluded, including the possible development of an international instrument or instruments. They have also underscored that WIPO’s work should not prejudice developments in other forums.

11. More recent sessions of the Intergovernmental Committee have examined draft principles and objectives<sup>2</sup> that could shape *sui generis* instruments on TK and TCEs. This approach to protection could recognize, amongst other things, collective interests in traditional know-how and expressions of traditional cultures which are “characteristic” of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the knowledge or cultural expressions.

12. These drafts include compliance with the “free, prior and informed consent” (FPIC) principle and the recognition of customary laws and practices. In line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over TK or TCEs, but accommodate this option should communities wish to take it up.

13. The current draft of the WIPO provisions on TCEs proposes *inter alia* that it might be necessary for certain TCEs for which especially strong protection is proposed, to be notified to or registered with some or other authority as a condition of protection. The draft also suggests certain exemptions for “non-commercial research or private study” and for the making of recordings and other reproductions of TCEs “for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes”.<sup>3</sup> The draft WIPO provisions are intended to “complement and work together with laws and measures for the preservation and safeguarding of cultural heritage.”

14. All working documents, comments, papers, studies, databases, questionnaires, and other material prepared for consideration by the Intergovernmental Committee, as well as comprehensive reports of its sessions, are publicly available, in English, French and Spanish at <<http://www.wipo.int/tk/en/igc/documents/index.html>>.

## II. *Safeguarding Intangible Cultural Heritage and Protecting Creativity*

15. Museums, archives, libraries, anthropologists, art historians and ethnologists play an invaluable role in preserving the rich cultural heritage of our planet. By recording and making available the music, arts, knowledge and traditions of indigenous communities, these institutions and researchers help to spread a broader understanding and respect for different cultures.

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<sup>2</sup> Current drafts were published as WIPO documents WIPO/GRTKF/IC/8/4 (TCEs) and WIPO/GRTKF/IC/8/5 (TK), both dated April 8, 2005. Comments received on earlier drafts are available at [http://www.wipo.int/tk/en/consultations/draft\\_provisions/comments.html](http://www.wipo.int/tk/en/consultations/draft_provisions/comments.html) (December 5, 2005).

<sup>3</sup> Draft Article 5.

16. Recent initiatives to digitize entire libraries and other cultural heritage and historical collections and make them widely available hold the promise of promoting cultural exchange and diversity; museum, library and archival services; scientific and scholarly progress; educational opportunities; and, creativity.

17. IP issues arise at every stage of the collection, cataloguing, inventorying, recording, presenting, conservation and re-use of cultural materials by cultural heritage institutions and specialists. IP questions arise for museums, archives and galleries in relation to their collections of original works, as well as derivative databases, catalogues, coffee-table books, educational materials, postcards and other mementos. IP issues become even more pressing as they set up digital libraries of their collections and strive to raise revenue through commercial activities.

18. These IP questions include issues such as in which circumstances may an archive, library or museum make copies, including digital copies, of a manuscript, recording or photograph in its collection for restoration/preservation purposes, for which non-commercial and commercial purposes may it make such copies available, electronically or otherwise, to external users, and so on.

19. Importantly, raising IP questions is not intended to complicate or restrict but rather complement and support the activities of cultural institutions. Clarifying IP issues and options in relation to safeguarding cultural heritage, with the close involvement of museums, archives, indigenous communities and other stakeholders, could strengthen synergies between the protection of cultural documentation and its preservation, enhance respect for traditional cultures and promote the wider, secure and fair exchange of cultural expressions between the peoples and communities of this culturally rich and diverse world.

Safeguarding cultural heritage and protecting traditional knowledge and cultural expressions against misappropriation and misuse

20. Specific IP questions also arise in relation to TK and TCEs. Indigenous peoples and other traditional communities express concerns that sometimes activities by museums and cultural specialists do not take adequate account of their rights and interests; and that documenting and displaying, say, a traditional song or a tribal symbol, make them vulnerable to misappropriation.

21. In other words, the very process of *preservation* of traditional cultural expressions can trigger concerns about their lack of *legal protection* against misappropriation and misuse.

22. Indigenous peoples cite numerous cases in which commercial users have exploited cultural heritage collections without seeking the consent of the relevant community, let alone acknowledging the source or sharing the commercial benefits. For example, some popular world music albums have included samples of traditional music that had originally been recorded and made publicly available for heritage preservation purposes. This can happen because of the “public domain” character of TCEs, which is the subject of criticism especially by indigenous peoples.

23. For instance, while a traditional song may be treated by IP law as in the public domain, recording that song creates IP rights in the recording, which are held by the person making the

recording. How those new rights are exercised can impact significantly on the interests of the source community.

24. In addition, indigenous representatives argue that indigenous peoples do not have control over research conducted into their cultures, nor over how their cultures are recorded and presented to the public at large. The handling of secret and sacred materials within such collections can be a source of particularly acute concern. The ethnographic collections of museums and other institutions often include invaluable, even unique, records of ancient traditions, lost languages and community histories which are vital to indigenous peoples' sense of identity.

25. In the words of indigenous expert Henrietta Fourmille, (Centre for Indigenous History and the Arts, University of Western Australia), the crux of the problem from an indigenous perspective is that the “information collected about us is simply not owned by us.”

26. On the other hand, sometimes exercise of IP rights can assist communities to protect their cultural expressions. For instance, the *Toulumne* tribe of California recently used copyright laws to stop the sale of CDs and videos of its sacred dances.

27. There are other cases in which recording a piece of traditional art, and exercising IP rights in that recording, proved the most effective means of protecting the original work against unauthorized use. For example, in Australia in 1997, T-shirts began appearing in a market depicting images from indigenous rock paintings found in the Deaf Adder Creek region. These rock art images, while ancient, are still highly significant to Australian indigenous life and custom. The original artist was unknown. And the rock art was so old that any copyright would have expired. So the indigenous custodial group had no remedy under copyright against the T-shirt manufacturers. However, drawings and photographs of the rock art images had been published in a study by a researcher funded by the Australian Institute of Aboriginal Studies, Eric Brandl, in 1973, thus creating new copyright. It was from this publication that the T-shirt manufacturers had apparently copied the images. With the help of the Institute and the Brandl family, the indigenous group was able to get the t-shirt company to stop production, claiming infringement of copyright in Brandl's drawings and photographs.<sup>4</sup>

### *III. Specific IP questions related to inventory-making*

28. The IP issues and implications associated with inventorying elements of intangible cultural heritage (ICH) depend to some degree on what “inventorying” means, and how and by whom it is carried out in practice.

29. For example, the IP issues raised by inventories which take the form only of “lists” are different from those which apply if inventorying can also mean the making of copies or other fixations of the elements of ICH being inventoried.

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<sup>4</sup> To read the full case study, compiled for WIPO by indigenous lawyer Ms.Terri Janke, see *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, (WIPO Publication No. 781).

30. IP issues can arise in connection with both the process of inventorying (including the collection, cataloguing, recording and fixation of the inventories, if applicable) and the subsequent management of the inventories (including if and on what terms they are made available and accessible to the public). Even if inventorying means the compilation of lists only, there are certain IP issues and implications to take into account. Taking account of IP issues and implications can have both legal and practical aspects.

31. The IP implications of establishing and managing inventories of ICH reach more broadly to the interplay between measures for the IP “protection” of creations and innovations, on the one hand, and the “safeguarding” or “preservation” of cultural materials, on the other.

32. The IP issues and implications associated with inventorying ICH are not obstacles to inventorying; on the other hand, they may require that some specific legal and practical steps be taken. Indeed, with appropriate coordination, measures for the safeguarding of intangible cultural heritage and for IP protection, including of TK and TCEs, could be mutually reinforcing and supportive.

#### Certain suggested questions for consideration

33. Some of the main questions that could arise are:

1. Could the process of inventorying ICH (such as making recordings of intangible cultural expressions, creating a database or digitizing existing materials embodying ICH) establish new IP rights?

- If so, in whom would those rights vest?
- Which acts would the rights cover?
- Would any exceptions or limitations apply?
- How long do the rights last?

2. Could inventorying prejudice the interests of the traditional custodians of traditional knowledge and cultural expressions?

- Would such inventories include sacred and/or secret materials?
- Would the prior authorization of any communities or individuals be needed? (for example, and performances of “expressions of folklore” are protected internationally under a WIPO treaty);
- To whom would the inventories be accessible?;
- Would the inventories facilitate the wide dissemination of TK and TCEs, so easing their misappropriation by third parties?;
- How would any customary rights and responsibilities attaching to elements of ICH be respected?

3. Could inventorying ICH have a role to play in protecting, preserving and promoting TK and TCEs?

- Could the fixation of otherwise unprotected ICH (such as a photograph or audio-visual recording) establish new IP rights that could be used by relevant communities or others to promote their interests (such as has happened with ancient rock art)?
- Could methodologies and standards for the inventorying of ICH be harmonized with IP-related standards for the documentation of TK and TCEs, either to establish IP rights or to prevent the obtaining of IP rights in the TK or TCEs by others (for example, WIPO Member States have agreed technical data standards for the registration of TK and genetic resources in databases for defensive and positive IP protection purposes)?

4. How could inventories of ICH and emerging *sui generis* measures for the protection of traditional knowledge and cultural expressions be mutually supportive?

- Could ICH inventories act as registers or databases of traditional knowledge and cultural expressions for which IP-type protection is claimed?
- How would ICH inventories under the UNESCO Convention on Safeguarding Intangible Cultural Heritage, 2003 relate, if at all, to existing registers and databases established as part of IP strategies (for example, one country has established a database of indigenous insignia to protect against their being trademarked, and several countries are establishing databases of TK)?
- Could such inventories assist in identifying the beneficiaries of such protection?
- Could they provide information on which uses of traditional knowledge and cultural expressions would be derogatory or offensive from a community perspective?
- Could national, regional or international inventories play a role in resolving competing claims to the same TK or TCEs by distinct communities (including those in different countries (so-called “regional folklore”))?

34. Answers to these and other related questions will depend on *inter alia*:

- How the inventorying takes place (does it involve, for example, the fixation into some or other material form, such as an audio recording, of oral materials);
- By whom the inventorying is undertaken; and, above all perhaps,
- Which specific elements of the ICH are being inventoried. From an IP point of view and taking the definition of “intangible cultural heritage” as described in the UNESCO Convention, 2003 as a starting point, ICH encompasses, amongst other things:
  1. Literary and artistic productions;
  2. Performances;
  3. Marks, symbols and other indications; and,
  4. Knowledge and know-how.

#### IV. *IP advice, guidelines and resources for cultural institutions*

35. While new technologies offer exciting possibilities for enhancing access to and better preserving ethnographic collections, concerns over access, ownership and control become even more pressing as museums and other institutions set up digital libraries of their collections. Furthermore, as indigenous communities turn more and more from mere subjects of study to new users of ethnographic collections and, above all, active participants in interpreting, presenting and re-using cultural materials, the evolving relationship between

source communities and collection-holding institutions and researchers calls perhaps for new approaches and models.

36. Cultural institutions, specialists and others are increasingly seeking technical information and advice on these issues with a view to formulating appropriate strategies that take relevant IP issues into account.

37. Answers to these complex questions of access, control and ownership are provided to some extent by the existing IP legal framework. In some cases the existing legal framework may not, however, respond in ways that satisfy indigenous communities. For example, as mentioned earlier, some materials might be treated as public domain under the law, but would not be seen so from an indigenous perspective. In other cases, IP tools can be used to protect traditional cultural expressions against misappropriation and misuse, as the examples above show.

38. Many institutions and professional bodies are developing ethical protocols and policies to complement the law and better address indigenous needs.

#### WIPO project

39. WIPO is undertaking a project in response to a widely-expressed need for technical information and a sharing of experiences on these issues, aimed at developing IP-related guidelines, “best practices” and model agreements related to the safeguarding of cultural heritage.

40. A first step in this project is the collection in a publicly-accessible database of guides, codes of conduct, protocols and standard agreements currently in use by museums, archives, libraries and researchers from around the world.

41. The database can serve as a resource for those interested in learning how cultural institutions, associations and researchers are addressing IP issues as they record, catalogue, inventorize, disseminate, present and re-use cultural materials.<sup>5</sup>

42. This collection of empirical materials and current practices could also serve as a basis for distilling IP-related best practices and developing IP-related check-lists, guidelines and model agreements for museums, archives, libraries and researchers. A further next step could be the preparation of a copyright guide for museums and other such institutions.

43. Such work would necessarily require the active involvement of all stakeholders: relevant governmental offices and intergovernmental bodies; archives, museums and other institutions; researchers; indigenous communities; professional bodies; IP lawyers, to name only a few.

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<sup>5</sup> For the first examples see [www.wipo.int/tk/en/folklore/culturalheritage/index.html](http://www.wipo.int/tk/en/folklore/culturalheritage/index.html).

44. Such resources may also benefit institutions establishing inventories of intangible cultural heritage, as provided for under the UNESCO Convention, 2003. The UN Permanent Forum on Indigenous Issues has recommended development of these kinds of resources.

*V. Concluding remarks*

45. Clarifying relevant IP issues and options, in conjunction with museums, archives, communities and other stakeholders, could contribute to realizing the promise of promoting creativity and economic development, museum and archival services, scientific and scholarly progress and educational opportunities.

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