

**UNESCO-ACCU Expert Meeting on Community Involvement in Safeguarding
Intangible Cultural Heritage: Toward the Implementation of UNESCO's 2003
Convention**

Information Note
prepared by
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Executive Summary

Safeguarding intangible cultural heritage (ICH) plays an invaluable role in preserving the rich cultural heritage of our planet, and promoting cultural diversity and respect for the traditions and ways of life of the world's diverse peoples and cultural communities.

ICH is integral to the identity, cultural life and livelihood of indigenous peoples and other local communities and groups, and is constantly recreated by them; it also provides them with a sense of continuity, and it fosters and transmits communal values, social cohesion and collective memory. It follows that the peoples and communities who are the bearers, practitioners and sources of ICH should play a prominent role in safeguarding it, and that their perspectives and aspirations should lie at the centre of safeguarding programs.

This Information Note will share some of the experiences of the World Intellectual Property Organization (WIPO) in working with indigenous peoples and other traditional and cultural communities in its work on the protection of traditional cultural expressions (sometimes referred to as "expressions of folklore") (TCEs) and traditional knowledge (TK) against misappropriation and misuse.

The subject matter under discussion in WIPO's work concerning misappropriation and misuse, TCEs and TK, corresponds roughly to the notion "intangible cultural heritage" in the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003 (the UNESCO Convention).

Representatives of indigenous peoples and other traditional and cultural communities have been closely involved in WIPO's work for several years, and continue to play a direct role in it. These communities form the majority of more than 120 observers directly accredited to WIPO's work in this area. Draft provisions for the enhanced protection of TCEs and TK being discussed within WIPO, developed in close consultation with Member States, indigenous peoples and other communities and a wide range of other stakeholders, seek to respond directly to the aspirations and expectations of indigenous peoples and other communities. For example, the draft provisions draw from and seek to recognize the customary laws, legal traditions and protocols of such peoples and communities.

Some of this information might be helpful as UNESCO, the ACCU and States parties to the UNESCO Convention consider how best to implement the Convention, in particular its provisions referring to communities.

More generally, ICH is also a source of creativity and innovation, and there is, therefore, a dynamic relationship between safeguarding ICH, the promotion of cultural diversity and protecting intellectual property (IP). Indeed, IP issues can arise at every stage of the collection, cataloguing, inventorying, recording, presenting, conservation and re-use of cultural materials by cultural agencies and institutions as part of safeguarding programs.

Certain specific IP questions arise in relation to the protection of TCEs and TK. Indigenous peoples and other traditional and cultural 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 TCEs can trigger concerns about their lack of legal *protection* against misappropriation and misuse.

ICH inventory-making can inadvertently facilitate the misappropriation, misuse and commercialization of TCEs to the detriment of their source communities and cultures; for example, digitizing and making accessible a traditional song can, while valuably contributing to the safeguarding of the song, enable the song to be copied and commercialized by a third party, so raising concerns as to its legal protection. The WIPO Performances and Phonograms Treaty, 1996 already protects performers of traditional music and other forms of folklore in just this context, and its application to this use of music would provide valuable protection against offensive uses and unwanted economic exploitation of the performer.

In response to a widely-felt need for technical advice and a sharing of experiences on these issues, WIPO is developing, with the involvement of all stakeholders, IP-related practical guidelines and “best practices” for cultural institutions and specialists engaged in collecting, inventorying, preserving and making accessible cultural heritage materials.¹

Raising IP questions is not intended to complicate but rather complement and support the activities of cultural agencies and 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.

Clarity on IP issues and options could also assist cultural institutions in devising strategies to both preserve cultural expressions and protect them against misappropriation and misuse for the benefit of bearer and source communities and humanity as a whole.

WIPO was pleased to have participated as an observer in the negotiations that led to the adoption of the UNESCO Convention, and to have participated with UNESCO and the ACCU in previous experts meetings on the Convention.² WIPO is pleased to have been invited to

¹ See <http://www.wipo.int/tk/en/folklore/culturalheritage/index.html>

² For example, UNESCO Expert Meeting on Inventorying Intangible Cultural Heritage (Paris, March 17 to 18, 2005), and ONCC-ACCU Sub-regional Experts Meeting in Asia on “Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies” Bangkok, Thailand, December 13 to 16, 2005.

participate in this Expert Meeting. WIPO looks forward to continuing to exchange experiences and ideas in relation to these questions with UNESCO, the ACCU and Member States.

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

3 “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. The work of WIPO is complementary to legal instruments and developments in other policy areas, such as safeguarding intangible cultural heritage, and takes into account and seeks to complement the work of other relevant intergovernmental and non-governmental organizations, such as UNESCO and the ACCU.

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

4 WIPO first began examining the relationship between IP and the protection, promotion and preservation of TCEs and TK several decades ago, often in cooperation with UNESCO.

5 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 WIPO Committee).

6 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

³ IP protection may take the form of exclusive IP 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. 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.

instrument or instruments. They have also underscored that WIPO's work should not prejudice developments in other forums.

7 More recent sessions of the WIPO Committee have examined draft principles and objectives⁴ 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.

8 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.

9 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”.⁵ The draft WIPO provisions are intended to “complement and work together with laws and measures for the preservation and safeguarding of cultural heritage.”

10 The drafts have not been adopted or endorsed by the Committee and may be developed further. They draw upon a wide range of community, national and regional experiences, and have been developed over several years by and in consultation with Member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties. Earlier drafts of the objectives and principles were the subject of an open commenting process established by the Committee. These draft materials are being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes.⁶

11 The next session of the WIPO Committee takes place from April 24 to 28, 2006.⁷

12 In the remainder of this Note, information is provided specifically on WIPO's experiences in consulting and working with indigenous and other communities, and on their perspectives and aspirations as directly reflected and addressed in policy, legal and practical issues under discussion in WIPO.

⁴ Current drafts were published as WIPO documents WIPO/GRTKF/IC/9/4 (TCEs) and WIPO/GRTKF/IC/9/5 (TK). Copies are available at this Experts Meeting.

⁵ Draft Article 5.

⁶ All working documents, comments, papers, studies, databases, questionnaires, and other material prepared for consideration by the WIPO 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>.

⁷ See <http://www.wipo.int/tk/en/igc/>

Participation of indigenous peoples and other communities in WIPO's work

13 WIPO's work on these issues has been marked from the outset by extensive consultation with and involvement of indigenous peoples and other traditional communities, such as through the fact-finding consultations in the late 1990's that set directions for WIPO's work.⁸ During these fact-finding missions, indigenous and other communities in 28 countries were visited and consulted on their IP-related needs and expectations. The results of this important initial phase shaped and still guides the intergovernmental discussions now taking place within the WIPO Committee.

14 There is continuing exploration and consultation on facilitating and further improving the participation of indigenous peoples in WIPO's work. Member States of WIPO have expressed their "unanimous support for directly involving as much as possible representatives of Indigenous and local communities in the work of the Intergovernmental Committee."⁹

15 In regard specifically to sessions of the WIPO Committee, a number of practical steps have already been undertaken, including:

(i) A fast-track accreditation procedure for all non-governmental organizations (NGOs) has been in place since the first session of the Committee in April 2001. More than 120 NGOs have received accreditation, the majority representing indigenous peoples. No applicant has been denied accreditation.¹⁰

(ii) Consultations and workshops at the national and regional level and other fora aimed at developing focussed input for the Committee have included representatives of the Permanent Forum on Indigenous Issues and indigenous and local communities as speakers and participants.

(iii) The WIPO Secretariat has continued its practice of consulting with interested representatives of indigenous and local communities on draft documents being developed for the Committee, as well as related capacity-building and awareness documents, including a series of case studies and a distance learning course contributed to by indigenous experts. Case-studies by indigenous lawyer, Terri Janke, valuably contribute practical community experiences to current intergovernmental discussions at WIPO.¹¹

(iv) The WIPO General Assembly has recently established the WIPO Voluntary Fund for Accredited Indigenous and Local Communities, to facilitate the participation in sessions of the Committee of representatives of indigenous and local communities, and other customary holders or custodians of TK and TCEs, which are already accredited to the Committee.¹²

⁸ See WIPO Report on Needs and Expectations of Traditional Knowledge Holders: Report of Fact-Finding Missions 1998-1999, available at <http://www.wipo.int/tk/en/tk/ffm/report/>

⁹ Report of Committee's Fourth Session (document WIPO/GRTKF/IC/4/15, para. 60).

¹⁰ See <http://www.wipo.int/tk/en/igc/index.html#accreditation>.

¹¹ WIPO, "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions", by Terri Janke, available at <http://www.wipo.int/tk/en/studies/cultural/minding-culture/>

¹² See further http://www.wipo.int/tk/en/ngoparticipation/voluntary_fund/index.html

(v) Sessions of the Committee are preceded by panel presentations chaired by a representative of an indigenous or local community. For example, such a panel, with the theme “Indigenous and Local Communities’ Concerns and Experiences in Promoting, Sustaining and Safeguarding their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources”, held at the commencement of the eighth session of the Committee (June 6 to 10, 2005). The panel comprised seven participants from indigenous and local communities in Canada, Indonesia, Papua New Guinea, Peru, Sweden, Ukraine and Zambia, all of whose participation was funded by WIPO. A similar panel will be held before the upcoming ninth session of the Committee (April 24 to 28, 2006).

Principle of responsiveness to aspirations and expectations of relevant communities

16 The substantive provisions referred to above are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the WIPO Committee since its inception and in international debate and consultations before the Committee’s establishment. One of these general guiding principles is one of “responsiveness to aspirations and expectations of relevant communities.”

17 This principle recognizes that protection for TCEs and TK should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities. This means, in particular, that the protection of TCEs and TK should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection measures, address both cultural and economic aspects of development, prevent insulting, derogatory and offensive acts in particular, promote cooperation among communities and not engender competition or conflicts between them¹³, and enable full and effective participation by these communities in the development and implementation of protection systems. Measures for the legal protection of TCEs and TK should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their TCEs and TK. It means that external legal protection against the illicit acts of third parties should not encroach upon or constrain traditional or customary laws, practices and protocols.

18 In line with this general principle, key substantive provisions of the drafts being examined by the WIPO Committee respond directly to community concerns and needs and place communities at their centre, such as provisions dealing with scope of subject matter, beneficiaries of protection, exceptions, management of rights, term of protection, formalities and sanctions, remedies and exercise of rights. For example, the beneficiaries of protection are communities, and use of a TCE by a community member within the customary context is exempt from regulation by the provisions. Copies of the draft provisions are available at this meeting.

Descriptions and definitions of peoples and communities

19 For present purposes, in the draft WIPO provisions referred to above, the broad and inclusive terms “indigenous peoples and traditional and other cultural communities” and

¹³ See Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993, paragraph 2.5, for example.

“indigenous peoples and local communities”, or simply “communities” in short, are used. In line with the proposition that any internationally agreed principles should allow national lawmakers sufficient flexibility regarding their implementation, the precise choice of term used to describe the beneficiaries of protection – and the meaning of that term - is probably best left for national and community consultations and for their decisions, and, therefore, there has not until now been a suggestion within WIPO’s discussions that there is a need to agree on a single term at the international level. The use of these terms in the current drafts of the WIPO provisions is not intended to suggest any consensus among States and community representatives on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national laws or in discussions in other international fora.

20 Indeed, various terms are used in existing laws,¹⁴ and there has been some discussion of this question in sessions of the WIPO Committee. Some delegations¹⁵ and representatives of observers¹⁶ have stated that the focus of the Committee’s work should be broader than “indigenous peoples” in the strict sense,¹⁷ although the particular concerns of indigenous peoples have been widely voiced in the Committee, from both governmental and non-governmental participants, so some distinct recognition of these communities may be maintained even in a broader context.

Consultations and studies on customary laws and intellectual property

21 WIPO has initiated a process of study and consultation on two related questions: (i) the role of the customary laws and protocols of indigenous and local communities in relation to their TK, genetic resources and TCEs, and (ii) the relationship of customary laws and protocols with the IP system.

¹⁴ The UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions of 1982 refer to “communities”, the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 to “traditional owners” and the Peru Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources to “indigenous peoples”, for example.

¹⁵ While indigenous peoples are important stakeholders in this discussion, ‘not all expressions of folklore belonged to indigenous peoples, and that it [is] necessary also to consider non-indigenous expressions of folklore’, Mexico (WIPO/GRTKF/IC/6/14, para. 30). See also Canada (WIPO/GRTKF/IC/ 6/14, para. 39).

¹⁶ The American Folklore Society (AFS) has stated that the term ‘folklore’ includes, but is not limited, to the knowledge of indigenous peoples. The AFS suggested that the work of WIPO address all traditional cultural groups who were entitled to IP protection of their traditional cultures, in addition to indigenous peoples, such as the Cajuns in Louisiana, the Amish in Pennsylvania and African-, Asian- and Latin-American communities in the United States of America. The AFS wished therefore to expand the concept of ‘traditional group’ so that it could be ascribed to various identities, such as regional, religious, ethnic or familial identities (WIPO/GRTKF/IC/5/15, para. 57).

¹⁷ The notion ‘indigenous peoples’ in the ‘stricter sense’ of the term refers to, as was discussed in the WIPO report on the fact-finding missions conducted in 1998 and 1999, the description of the concept “indigenous” in the Study of the Problem of Discrimination Against Indigenous Populations, prepared by Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. J. Martínez Cobo, which is regarded as an acceptable working definition by many indigenous peoples and their representative organizations. The Study understands indigenous communities, peoples and nations as “those which, having a historical continuity with ‘pre-invasion’ and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems”. The Philippines Law, 1997 and the Peru Law of 2002 use the term in this sense.

22 This work builds on an extensive past background of consultation and reflection on the role of customary laws and protocols, both within the Committee and in WIPO's broader dialogue with indigenous communities (such as the fact-finding consultations in the late 1990's that set directions for WIPO's work in this area). As noted above, the draft provisions for the protection of TK and TCEs already take account of the role of customary law, and the study process would complement these developments. The full background is described in an issues paper (see below) which has been developed to facilitate further consultations on this question.

23 Several mechanisms have been put in place to encourage and facilitate participation in this work by indigenous peoples and local communities. Interested parties are invited to submit papers, including commentaries, case studies, and analysis, dealing with the relationship between customary law and protocols and (i) the protection of TCEs and TK against misuse and misappropriation; or (ii) IP law in general and the administration and development of the IP system. These papers may respond to a draft background and issues paper that has been prepared¹⁸, but need not. A set of suggested guidelines¹⁹ has been prepared to stimulate papers.²⁰ WIPO is commissioning studies from indigenous legal experts to supplement this process.

III. Concluding remarks

24 As the bearers and practitioners of TCEs and TK, indigenous peoples and other traditional communities have enriched discussions at WIPO on the protection of TCEs and TK against misappropriation and misuse, and a number of practical modalities are in place to facilitate their continued involvement in WIPO's work. Furthermore, their perspectives and aspirations are directly reflected in the substantive legal and policy issues currently under discussion in WIPO. WIPO hopes that the information in this Note on these issues, and on its experiences in working closely with indigenous peoples and other communities, is of interest and assistance.

25 More generally, exploring practical complementarities between ICH safeguarding and IP protection, and clarifying relevant IP issues and options that relate to safeguarding of ICH, could contribute to realizing the promise of promoting creativity and economic development, museum and archival services, scientific and scholarly progress and educational opportunities. Taking IP issues into account when safeguarding ICH can also prevent that safeguarding activities inadvertently facilitate the misappropriation and misuse of ICH.

26 The WIPO Secretariat remains available at any time to share information on the IP aspects of these questions, and looks forward to continuing to exchange experiences and ideas in this regard with UNESCO, the ACCU and Member States.

¹⁸ See http://www.wipo.int/tk/en/consultations/customary_law/issues.pdf

¹⁹ See http://www.wipo.int/tk/en/consultations/customary_law/guidelines.pdf

²⁰ For more information, see http://www.wipo.int/tk/en/consultations/customary_law/index.html