

Archiving Traditional Cultures: Intellectual Property Implications

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I. Introduction

Archives, along with other cultural institutions, play an invaluable role in preserving and providing access to elements of the cultural heritage of indigenous peoples and traditional communities. Yet these preservation and promotion activities may sometimes conflict with the intellectual property (IP) rights and interests of indigenous peoples and traditional communities in their traditional cultural expressions (TCEs). Careful management of these IP rights and interests by cultural institutions, including sound and audiovisual archives, may help resolve some of the existing tensions and may pave the way for a better understanding of the responsibilities that emerge when dealing with collections of TCEs.

This article first offers some background information on the World Intellectual Property Organization (WIPO) and its program on TCEs. It then examines the challenges that TCE-holding cultural institutions may face and how the management of IP rights can contribute to overcoming such challenges. Lastly, it looks into the activities of WIPO in the very specific area of traditional cultures, indigenous peoples and IP.

What is the World Intellectual Property Organization?

WIPO is a specialized agency of the United Nations.¹⁰⁵ It is dedicated to developing a balanced and accessible international IP system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest.

WIPO's Traditional Knowledge Division

WIPO first began examining the relationship between IP and the protection, promotion and preservation of TCEs several decades ago. As early as 1967, the Berne Convention for the Protection of Literary and Artistic Works (1886), last revised in 1971, was amended to provide a mechanism for the international protection of unpublished and anonymous works (Article 15.4), thereby providing international protection for TCEs. Today, the Traditional Knowledge Division of WIPO handles issues concerning the protection of traditional knowledge (TK) and TCEs against misappropriation and misuse, and the IP aspects of access to and benefit-sharing in genetic resources.¹⁰⁶

WIPO facilitates the negotiation of legal instruments for the protection of TK and TCEs, and carries out capacity-building activities. In particular, WIPO commissions case-studies, provides legislative assistance, and carries out awareness-raising, education and training activities, such as workshops and seminars. WIPO also offers mediation and arbitration services in resolving disputes, including those that may arise in relation to the preservation of and access to archival materials. More information on WIPO's activities is presented in section 4, *infra*.

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¹⁰⁵ For more information about WIPO, see http://www.wipo.int/about-wipo/en/what_is_wipo.html. For a list of WIPO's Member States, see <http://www.wipo.int/members/en/>

¹⁰⁶ For many communities, TCEs, TK and associated genetic resources form part of a single integrated heritage. Yet, because TCEs raise some particular legal and policy questions in IP, they receive a distinct focus in many national and regional IP laws and in WIPO's work.



What is Intellectual Property?

IP refers to creations and innovations, i.e., the results of creative intellectual activity. Examples include inventions, designs, literary and artistic works, symbols, names, images, and performances.

IP regimes typically consist of laws that establish private property rights in order to grant control over access, use, misappropriation and exploitation, particularly commercial exploitation, and to provide incentives for further creativity.

Copyright, for example, protects the products of creativity, in the form of original works, against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. It can also provide “moral” protection against demeaning or degrading use of a work (an issue that is often of concern in relation to TCEs) and ensures that proper attribution is given when a work is used.

What are Traditional Cultural Expressions?

TCEs are any form in which traditional culture and knowledge are expressed, appear or are manifested.¹⁰⁷ Examples include tales, poetry, signs and symbols, songs, dances, plays, performances, rituals, drawings, paintings, jewelry, designs, handicrafts, musical instruments, architectural forms, and many others.

TCEs are the products of fluid creative intellectual activity. They are maintained, used or developed by a community or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

Handed down from one generation to another, they are characteristic of a community’s heritage and reflect a community’s history and values, as well as its cultural and social identity.

TCEs are both cultural and economic assets of the peoples and communities who are their creators, practitioners, and custodians. They are a precious resource, a viable income and help preserve a traditional lifestyle. They are, however, subject to misappropriation and misuse,¹⁰⁸ and calls for their protection have received attention at the international level.

What does it mean to “Protect” Traditional Cultural Expressions?

Clarity on what is meant by “protection” is primordial, because the needs and expectations of TCE holders and practitioners can in some cases be addressed more appropriately by measures for preservation and safeguarding rather than IP protection.

Preservation and Safeguarding

Notions of “preservation” and “safeguarding” generally refer to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability.¹⁰⁹ The objective, in short, is to make sure that the TCEs do not disappear, become lost or degrade.

Intellectual Property Protection

Another form of protection is the application of laws to prevent unauthorized or inappropriate

¹⁰⁷ The economy has slowed down the Singapore opening, but the Gracenote projects, including mounting our cataloging, are moving full speed ahead. The catalog should be up and searchable in June 2010. Visit the website for updates: www.arcmusic.org

¹⁰⁸ For some examples of misappropriation, see the WIPO publication *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, Study no1, available at <http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>

¹⁰⁹ The preservation and safeguarding of cultural heritage and the promotion of cultural diversity are key objectives of several international conventions and programs as well as regional and national policies, practices and processes. UNESCO is the United Nations organization dealing most closely with these issues.

use of TCEs by third parties beyond the traditional circle. This form of protection focuses on the *use* of TCEs. This is the IP form of protection: recognition of the need to prevent misuses and misappropriations of TCEs e.g., their unauthorized copying, adaptation or use. WIPO's work is principally concerned with the "protection" of TCEs in the IP sense.

Within the IP framework, the protection of TCEs may help achieve many different objectives:

1. Economic and moral *control* over intangible creativity, to enable exploitation by TCE holders;
2. *Prevention* of inappropriate, unwanted use and commercialization by others (including use that falsely suggests a connection with a community, derogatory use, and use of sacred and secret TCEs);
3. *Remuneration* for third party uses; and
4. *Acknowledgement* of the source.

Although not able to provide "perfect" protection, the copyright system is particularly relevant. Indeed, contemporary adaptations or arrangements by current generations of old and pre-existing traditional materials can often be sufficiently original to qualify as protected copyright works. Moreover, related rights can provide protection for performances, recordings and contemporary interpretations of TCEs. In fact some countries already protect TCEs within their copyright law.¹¹⁰

Industrial property has also been used to protect TCEs — notably trademarks (such as collective marks), geographical indications, industrial designs, and the law of unfair competition. These regimes aim at the protection of established reputation, distinctiveness and goodwill, such as may be enjoyed by a traditional community in the production of handicrafts, artworks and other traditional products.

In a nutshell, existing IP systems may be useful for communities whose primary aims are to prevent the unauthorized use of their creative productions and to exploit their creative arts and contemporary adaptations of their TCEs in the marketplace.¹¹¹

However, IP laws, as they currently exist, are probably not sufficient to protect the underlying and pre-existing cultural heritage and traditional culture. WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) is currently looking into a *sui generis* protection mechanism for such pre-existing TCEs. The IGC's work is addressed in section 4, *infra*.


2. The issue: the intellectual property management of Traditional Cultural Expressions in archives

The collections of audiovisual and sound archives may include TCEs: invaluable records of ancient traditions and community histories that are integral to indigenous peoples' and traditional communities' identity and continuity. Preserving, granting access to, and permitting uses of these materials, although core functions of archives, may present a number of IP challenges. These challenges may arise with respect to conventional IP issues (principally copyright and related rights), but often go beyond and encompass questions of a more "ethical" nature.

In fact, indigenous and traditional communities have voiced concerns that the activities of TCE-holding cultural institutions sometimes do not take adequate account of their rights and interests. For instance, documenting and displaying a traditional song or a tribal symbol may make them vulnerable to misappropriation and misuse.

¹¹⁰ For example, the laws of Oman, Papua New Guinea, Tunisia and Ukraine, to name only a few. For a complete list (to the extent of our knowledge), see our compilation of laws and legislative measures at <http://www.wipo.int/tk/en/laws/folklore.html>.

¹¹¹ See generally, WIPO Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, Background Paper No. 1, available online at http://www.wipo.int/tk/en/publications/785e_tce_background.pdf.



An archive's mandate thus also comprises the preservation of the sensitivities and underlying rights of indigenous peoples and traditional communities. This may be tricky as the IP rights are often not owned by them.

Indeed, TCEs were often collected and documented by external researchers without obtaining the prior informed consent of the community. As a result, the IP rights related to these TCEs are often not owned by the community, but rather by the researchers who “made” the film, sound recording or photographs.¹¹² It is indeed the person documenting the TCE who gains copyright and/or related rights over the form in which it is recorded (e.g. a photograph, film or sound recording of a TCE).

As a consequence, the legal status of TCEs under IP law is often unclear. While they may be perceived as being in the public domain¹¹³ by conventional IP law, their documentation may give rise to new rights and thus provide them with some form of IP protection. For example, although a traditional song may be treated by IP law as in the public domain, recording that song creates new IP rights in the recording, which are held by the person making the recording, as mentioned above. IP may also vest in photographic and digitized images of collection items.

In reaction, indigenous peoples and traditional communities have a growing interest in being more directly involved in recording, presenting and representing their own cultures to the public at large.¹¹⁴ Today, they are asserting themselves not as the objects of study by others, but as legitimate right holders who should be actively in control of how they are represented.

Lastly, the TCEs in an archive's collections might contain sacred or confidential material and be subject to restricted use under customary laws. For these culturally significant TCEs, some uses allowed under IP regimes can be considered inappropriate by the community. Looking beyond IP may hence be necessary.

Digitization issues

Digital technologies and the Internet offer unprecedented opportunities for the promotion, preservation, revitalization, dissemination and protection of TCEs, thereby meeting the desire of communities to pass on their cultural heritage to succeeding generations. New technologies indeed offer a means to safeguard and restore TCEs, especially elements in danger of erosion and disappearance.

What is more, new IP rights are actually created in digital recordings, and by creating and exercising them, protection of TCEs can actually be enhanced. In the digital world, traditional music, designs and art can reach new audiences in niche markets for distinctive, diverse and “local” cultural goods and services, and, in so doing, promote economic and cultural development, and enhance cultural exchange.

However, the digitization, dissemination and circulation of TCEs can be in direct antithesis to the communities' perspectives about how access to their collections is to be provided. In some cases, safeguarding efforts through digitization have unwittingly led to the unauthorized disclosure or commercial exploitation of sensitive materials. In one particular case, in the 1990s, music from Ghana, Solomon Islands and African Pygmies was fused with techno-house dance rhythms. Large profits were made from sales of the record, with no returns

¹¹² See ANDERSON, Jane, Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use, (5-7 May 2007) (paper presented at the conference Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena, Columbia University, New York, United States), available at http://correctingcourse.columbia.edu/paper_anderson.pdf (last visited 12 March, 2010).

¹¹³ See Archives and Museums: Balancing Protection and Preservation of Cultural Heritage, WIPO Magazine, September 2005, available online at http://www.wipo.int/wipo_magazine/en/2005/05/article_0010.html.

¹¹⁴ See HUDSON, Emily, Cultural Institutions, Law and Indigenous Knowledge: A Legal Primer on the Management of Australian Indigenous Collections, 2006, available at http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/aiatsis_ipria.pdf (last visited 11 March 2010).

to traditional musicians and no attribution. The music producers had gotten access to the music from a cultural heritage archive where ethnomusicologists who had recorded the music had deposited the recordings.

Whether to use new technologies to participate in the information economy is tied to the overall cultural and economic goals of the communities themselves, which only they can decide upon. An archive should thus be wary when embarking on a digitization initiative.

3. Changing behaviors: a role for archives

In response to the abovementioned challenges, the role and function of cultural institutions such as audiovisual and sound archives are being re-evaluated, and the nature of their collections re-assessed. In particular, there is increasing awareness among communities, archives, and researchers that IP has to be managed appropriately and that this can form part of a deliberate strategy that works to enhance one's ethical and reputational success. Clarity and certainty on IP options could strengthen relationships between archives and communities.¹¹⁵

In order to better serve the interests of communities and suit the sensitive nature of TCEs, archives can turn into platforms for clarifying IP issues, focusing on changing modes of conduct through the development of best practices,¹¹⁶ such as IP-related protocols and policies relating to the safeguarding of, access to, ownership of and control over TCEs. While they differ from legal obligations, good practices can identify appropriate ways of using TCEs and of interacting with source communities.¹¹⁷ Such practical tools can encourage ethical conduct and collaborations based on good faith and mutual respect, thereby promoting creativity, community development, archival services, and scientific and educational opportunities.

4. WIPO's program and activities

The Creative Heritage Project

Transformations in the world of archives, as well as libraries and museums, have prompted the establishment of WIPO's Creative Heritage Project,¹¹⁸ which weaves links between the protection of TCEs and the important educational and social role of cultural institutions in general.

The Project is developing resources for the strategic management of IP rights and interests by collecting institutions, in particular, when recording, documenting, digitizing and disseminating TCEs. These aim to assist communities and cultural institutions to manage IP options so as to both preserve and protect TCEs.

Examples of such resources include, among others, surveys on practical experiences with IP in the archival practices of institutions and of indigenous and local communities;¹¹⁹ a searchable


¹¹⁵ See WENDLAND, Wend, "Managing Intellectual Property Options when Documenting, Recording and Digitizing Intangible Cultural Heritage", in *Intangible Cultural Heritage and Intellectual Property—Communities, Cultural Diversity and Sustainable Development*, KONO, Toshiyuki, ed., Intersentia, 2009.

¹¹⁶ See WENDLAND, Wend, *Libraries, Intellectual Property and Traditional Cultural Expressions: Balancing Access and Control*, Keynote Address, American Library Association Conference on "Cultural Heritage and Living Culture: Defining the U.S. Library Position on Access and Protection of Traditional Cultural Expressions", Washington, D.C., November 12-14, 2008, <http://wo.ala.org/tce/wp-content/uploads/2008/10/wendland-keynote-american-library-association-final-nov-12-08.pdf>. See also ANDERSON, note 8.

¹¹⁷ See Australia Council for the Arts, *Performing Cultures: Protocols for Producing Indigenous Australian Performing Arts*, 2002, available at http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/performing_cultures.pdf

¹¹⁸ WIPO, under the Creative Heritage Project, aims to assist communities and cultural institutions in managing IP options so as to both preserve cultural heritage and protect it against misappropriation and misuse. For more information about the Creative Heritage Project, please visit: <http://www.wipo.int/tk/en/folklore/culturalheritage/>.

¹¹⁹ Surveys have been conducted in North America, the South Pacific, Bulgaria, India and France. These surveys are available at <http://www.wipo.int/tk/en/folklore/culturalheritage/surveys.html>. Surveys conducted in Brazil and Argentina will be made available soon.



database of codes, policies and practices;¹²⁰ and a forthcoming publication on IP management for museums, archives and libraries.¹²¹ The publication identifies the IP questions that pertain to the management of access, ownership and control over collections comprising TCEs.

Archives interested in devising IP-related strategies in support of their safeguarding and educational uses could benefit from these resources. These could indeed assist in making decisions that balance the “public interest” goals of the institution alongside those of the relevant traditional custodians who also hold legitimate perspectives with respect to the collections.

It should be noted however, that it is not the aim of the Project to establish norms or guidelines which would constrain institutions in how they deal with these issues. The Project acts as a source of ideas and options for institutions that may have less experience in this complex and evolving area.

The Project is also offering training in documentation, recording and digitization of intangible cultural heritage for indigenous and local communities and staff of cultural institutions in developing countries.¹²² This WIPO program is carried out in partnership with the American Folklife Center/Library of Congress and the Center for Documentary Studies, in the United States of America. It provides training in documentary techniques and archival skills necessary for effective community-based cultural conservation, as well as IP training and a basic kit of audiovisual equipment provided by WIPO. A pilot project has been concluded with success with the Maasai community in Kenya.

The Intergovernmental Committee

The Creative Heritage Project is a practical complement to the negotiations on IP norms for the protection of TCEs taking place in several countries and internationally at the WIPO IGC.¹²³

The IGC is currently negotiating Draft Provisions¹²⁴ for the *sui generis* protection of TK and TCEs. These Draft Provisions draw upon a range of community, national and regional experiences, and have been developed over several years by and in consultation with Member States, indigenous peoples and traditional communities, civil society organizations and a range of other interested stakeholders.

The Draft Provisions illustrate some of the perspectives that are guiding work in this area, and suggest possible frameworks for the protection of TCEs against misappropriation and misuse. They are already being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes.

In particular, they seek to respond to the needs of safeguarding and the specific IP aspects of registering and documenting TCEs. For example, one provision concerns the effect to which the measures for the protection of TCEs would not apply to 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.¹²⁵

¹²⁰ The database may be accessed at http://www.wipo.int/tk/en/folklore/creative_heritage/index.html. One example of an initiative documented on the WIPO website is the Mukurtu Wumpurrarni-kari Archive in Australia. This archive was established by the Warumungu community to house photos, digital video clips, audio files and digital reproductions of cultural artifacts and documents. Access to the digital archive is defined by access parameters based on a set of Warumungu cultural protocols for the viewing and distribution of cultural knowledge. For more information about the archive, see <http://www.mukurtuarchive.org/> (last accessed 9 April, 2010).

¹²¹ The publication is expected to be published in mid 2010.

¹²² For more information about the training program, see <http://www.wipo.int/tk/en/folklore/culturalheritage/community-cult.html>

¹²³ For more information about the IGC, see: <http://www.wipo.int/tk/en/igc/>

¹²⁴ See Draft Provisions supra note 3

¹²⁵ See Draft Provisions, Article 5(a)(iii).

5. Conclusion

Archives lie at the junction between source communities and the public. They emerge as pivotal spaces within which fundamental questions about access, control, ownership and authorship in TCEs can be examined, negotiated and rebalanced. Archives may thus be in a position to play a key mediatory role in protecting TCEs, while also making it possible for people to use, re-use and re-create cultural heritage, which are all vital to its survival.¹²⁶

However, IP issues, which inevitably arise, require consideration and management. In this respect, guiding practices need to strike balances among the interests of creators, communities, cultural institutions and the public at large. They also need to take into account the role, contours and boundaries of the public domain. Such IP-related protocols, codes of conduct and guidelines could afterwards perhaps serve as a basis for informing wider policy debates and contribute to building international normative consensus on the protection of TCEs.¹²⁷ A WIPO forthcoming publication entitled “Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives” will certainly be of use to all those at grips with such issues.

¹²⁶ See ANDERSON, *supra* note 8.

¹²⁷ See WIPO Consolidated Analysis, *supra* note 7.