

Analysis Report

Analysis Report on Field Survey on IP Issues in the Process of ICH Information Building and Sharing

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I. Analysis of Questionnaire

A. Overview

Ever since the Convention for the Safeguarding Intangible Cultural Heritage (ICH Convention or Convention hereafter) was declared in 2003, safeguarding of intangible cultural heritage (ICH) in the world came into a new stage of preservation of traditional culture. Through the Convention, state parties, institutions concerned, and relevant workers made solid ground in implementing safeguarding.

Safeguarding is systematic activities that aim to ensure the viability of the intangible cultural heritage including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission—particularly through formal and non-formal education—as well as the revitalization of the various aspects of such heritage.¹

The Convention distinguished safeguarding measures on a national level from those of international ones. On the national level, the Convention clearly mentioned that inventorying is the key word for the safeguarding of intangible cultural heritage. That is, to ensure identification of a certain kind of intangible cultural heritage for the purpose of safeguarding, each member state is obliged to draw up one or more inventories of the intangible cultural heritage present in its territory.²

In the course of implementation of safeguarding measures at the national level, safeguarding activities can be divided into two stages – before inventorying and after. Safeguarding of intangible cultural heritage is a series of activities aimed at effective preservation of the heritage and dissemination of it. Such activities start with identification of the elements of intangible cultural heritage followed by documentation. At this stage, drawing up inventories becomes available. After inventories are made, databasing or archiving, and publishing or distributing including utilising digital contents are necessary for a specific intangible cultural heritage to be viable from generation to generation.

Intellectual property issues are raised in the course of every stage of ICH activities. Human rights-related issues can arise in the course of identifying

¹ Convention for the Safeguarding Intangible Cultural Heritage (Convention hereafter) art. 2 para. 3.

² See Convention art. 12.

ICH elements or moral rights can be violated in the course of publishing or distributing ICH contents. Issues in misappropriation or exploitation may be raised in the course of publishing or distributing ICH elements. As such, issues in relation to intellectual property can be raised anywhere in the course of ICH activities. However, the present legal system nestled in ICH state parties are far from giving solutions to these questions.

This “Questionnaire for the Field Survey on Intellectual property Issues in the Process of ICH Information Building and Sharing Activities” was designed to examine intellectual property issues, focusing on the activities of ICH information-related institutions in the Asia-Pacific region. Conducting this type of field survey will eventually contribute to the safeguarding of ICH as intellectual property issues are developed step by step.

B. ICH Information Building and Sharing in the Asia-Pacific Region

1. Profiles of Respondents

Nine institutions participated in the survey. Many of them answered the questionnaire with the collaboration of other institutions. Respondents of the questionnaire are generally located in urban settings as they have close relationship with their central government or its instrumentalities. The majority of respondents have a relatively short experience with ICH-related work compared to other areas in their function.

Respondents are not limited to a specific geographical region in their activities. They are also not specialized in a specific area(s) of ICH; rather, they deal with various kind of ICH. Their functions vary from research to broadcasting and to education, among other things. The major participating respondents in this survey are listed below, by country:

- Fiji: Department of National Heritage, Culture and Arts and five other institutions
- India: SAHAPEDIA
- Kazakhstan: Kazakhstan National Commission for UNESCO
- Korea: National Research Institute of Cultural Heritage (NRICH)
- Kyrgyzstan: Kyrgyzstan National Commission for UNESCO

- Mongolia: Foundation for Protection of Natural and Cultural Heritage in collaboration with: (a) the Mongolian National Broadcaster; and (b) the Center for Cultural Heritage under the Ministry of Education, Culture and Science
- Philippines: National Commission for Culture and the Arts (NCCA)
- Sri Lanka: Sri Lanka National Committee on Intangible Cultural Heritage (SLNCICH)
- Vietnam: Five respondents from: (a) Vietnam Institute of Cultural and Arts Studies (VICAS); (b) Vietnamese Institute for Musicology (VIM); (c) Copyright Office of Vietnam (COV); (d) Viet Reproduction Rights Organization (VIETRRO); and (e) VietPictures Media Company

2. Characteristics of Respondents

The majority of respondents are governmental units or public organizations. Accordingly, a public fund or the government's budget funds these institutions. One exception is an Indian respondent whose institution is a not-for-profit organization. Its main source of funding is philanthropic.

As ICH is not one to generate inherent economic value, room hardly exists for private organizations to become directly involved. Considering the socio-economic environment of the majority of respondent, it is not easy to draw philanthropic funds from the society that respondents belong to. In this context, India's case for budget sourcing is exemplary.

C. Activities on ICH Information Building and Sharing by Respondents

The Questionnaire classifies activities of ICH building and sharing into seven categories: (1) identification; (2) documentation; (3) inventory making; (4) database/archive building; (5) publication and distribution; (6) utilising digital contents; and (7) other activities. In this section of the questionnaire, respondents answered sincerely with a keen interest; however, in many cases, specifications of activities were not mentioned.

Six of nine respondents answered identification activities on ICH information building and sharing. Of the activities, seven were answered documentation activities, three were inventory making ones, all nine were database/archive building ones, eight were publication and distribution ones, eight were utilising digital contents ones, and four respondents answered other

activities.³ Answered other activities included holding workshops and seminars,⁴ ICH photo exhibition,⁵ training traditional knowledge,⁶ networking, education,⁷ among others.

Various subjects made answered identification activities. Subjects of identification activities, for example, were: (1) communities;⁸ (2) Not-for profit institution;⁹ (3) multiple public institutions;¹⁰ and (4) broadcasting media,¹¹ among others. The method of identification activities also varied. Identification was made through: (1) prioritising ICH;¹² (2) conducting interviews;¹³ and (3) research.¹⁴

Answered documentation activities were also made in various ways, such as: (1) content creation and compilation by taking performance and/or lecture-demonstrations;¹⁵ (2) making, as well as preserving numerous documents and recordings according to the stipulation of law;¹⁶ and (3) documenting knowledge of the bearers of traditional craft technologies including items in danger of disappearing, such as tools and raw materials, methods of

³

Activity classification	Identification	Documentation	Inventory Making
Number of respondents	6	7	3

Activity classification	Database/ Archive Building	Publication and Distribution	Utilizing Digital Contents	Other
Number of respondents	9	8	8	4

⁴ Indian respondent.

⁵ Korean respondent.

⁶ Kyrgyz respondent.

⁷ Filipino respondent.

⁸ Fijian respondent.

⁹ Indian respondent.

¹⁰ Kazakh and Kyrgyz respondents.

¹¹ Mongolian respondent.

¹² Fijian respondent.

¹³ Indian respondent.

¹⁴ Kazakh respondent.

¹⁵ Indian respondent.

¹⁶ Korean respondent.

preparation of the raw materials, craft items' production stages, and forms and meanings of ornaments/ornamental motifs.¹⁷

Answered inventory making activities were made by relatively fewer respondents. Inventories were made about: (1) the Kyrgyz craft technologies and ornament in Kyrgyzstan and Central Asia three times from 2005 to 2011;¹⁸ (2) the bits of information accumulated in the 'Preliminary Enumeration' are then evaluated, prioritized and the data is entered into a 'Summary Inventory Form' which are compiled in a database that constitute the Inventory of Philippine Intangible Cultural Heritage;¹⁹ and (3) broadcasting and research.²⁰

Answered database/archiving activities were the ones all respondents implemented. They were made by: (1) the data keeping on database held by the relevant government department through its cultural grants inventory;²¹ (2) compilation;²² (3) updating the database with the use of private folk-music archives and records of traditional art discovered in the course of similar projects as in the case of the projects of "1000 traditional instrumental *kyuis*" and "1000 Kazakh traditional songs" in 2010, and mainly obtaining ICH-related data and archives via field work and documentation performed within the scope of the study curriculum. Also in the course of such field work, traditional songs, *kyus*, *termes*, the text of poetic works and proses, information on the bearers of such knowledge, authors, genres, and other narrative works, were documented in video and audio recording. Other relative information was recorded by diary writing and compilation of inventory lists. Sometimes the data can be obtained in the form of donation that are generally registered in the same form;²³ and (4) collecting an archive of the handicraft items' photo and video images including items found in the Museum Archives of Kyrgyzstan and the Russian Anthropological Museum in Sanct-Petersburg, created a database, and consisted of the description of craft technologies and ornaments, classified by names of creators and territory, photos, and video films and articles, and many more.²⁴

¹⁷ Kyrgyz respondent.

¹⁸ Kyrgyz respondent.

¹⁹ Filipino respondent.

²⁰ Mongolian respondent.

²¹ Fijian respondent.

²² Indian respondent.

²³ Kazakh respondent.

²⁴ Kyrgyz respondent.

Answered publication and distribution activities were made by: (1) operating a website which included a brief summary on the type of ICH that had received a cultural grant for revitalization;²⁵ (2) disseminating publications free of charge through relevant institutions as well as national and public libraries all over the country and providing an online service at 'http://portal.nricp.go.kr' in which one can download the original texts;²⁶ and (3) publishing four catalogs on crafts items and exhibitions, directory of craftsmen and maps of crafts of Fergana Valley, and many leaflets and articles in newsletters.²⁷

Answered utilizing digital contents activities were made by: (1) creating contents;²⁸ (2) creating a digital database by the institute for enhancing the effectiveness of the research carried out by the departments of folklore, manuscripts, cataloguing, ancient Kazakh literature, fine arts, theatre and music arts;²⁹ (3) final products of documentation classified into images, photos, and texts;³⁰ and (4) producing video courses on different craft technologies, TV and radio programs with use of interview with craftsmen, video films and clips about ICH.³¹

Other activities are answered as workshops and seminars, the ICH photo exhibition, training traditional knowledge, and networking and education, among many others, as mentioned above.

D. Activities about Intellectual Property Issues

1. Overview

Awareness of the necessity of using intellectual property rights as a safeguarding tool in intangible cultural heritage has a relatively short history. Especially after the ICH Convention was declared in 2003, intellectual property rights in relation to safeguarding of intangible cultural heritage have been considered more important.

Every country has laws and a legal system to protect intellectual property and its rights through relevant government offices and personnel. They may

²⁵ Fijian respondent.

²⁶ Korean respondent.

²⁷ Kyrgyz respondent.

²⁸ Indian respondent.

²⁹ Kazakh respondent.

³⁰ Korean respondent.

³¹ Kyrgyz respondent.

be well specialized in handling intellectual properties such as patents, trademarks and/or copyright with the conventional concept of the laws of intellectual property. However, such legal concepts have not extended to the new necessity of safeguarding intangible cultural heritage, except a few contingent cases.

The need to safeguard ICH through legal protection will increase as more resources in ICH are identified and further inventoried. The idealistic safeguarding of ICH should be made through a systematic legal mechanism rather than the other way around. However, it may take time to overcome the current existing legal concepts of it. In this context, it is meaningful to survey how much and in what degree institutions handle intellectual property issues in relation to ICH.

2. Operation of responsible unit or personnel

All the governments of respondents do have an intellectual property office in general. Some responding public institutions also have a responsible unit or personnel to handle intellectual property issues. However, in the cases that respondents are a private institution, they do not have their own responsible unit or relevant human resources.

As the majority of respondents in this questionnaire belong to the public sector, they have a responsible unit or persons to protect intellectual property rights in relation to ICH inside their government or institution.

For example, some have a centralized unit inside the government to handle IP issues (Fiji,³² Kyrgyzstan,³³ and Sri Lanka³⁴) and others maintain the function in a public institution, (Vietnam³⁵) while the rest answered nay or did not answer. However, regardless of what the respondents answered, their governments may have their own authority responsible for intellectual property issues, but it is unclear whether they handle issues for intangible cultural heritage.³⁶

³² Department of National Heritage, Culture & Arts of the Ministry of Education, National Heritage, Culture & Arts, Youth & Sports.

³³ The State Intellectual Property Office of the Kyrgyzstan Republic (KYRGYZPATENT).

³⁴ Intellectual Property Rights Authority of Sri Lanka.

³⁵ Literary and Art Copyright Office of Vietnam (COV) and Vietnam Reproduction Rights Organization (VIETRO)

³⁶ If ICH issues are handled by an authority of a country, it may be a very limited scope of ICH rights as such issues are not yet widely recognized by the modern legal regime

3. Principle or guidelines to protect intellectual property rights

No respondents answered that they had a principle or guidelines for protecting IP aspects of ICH regardless of having their own unit to handle IP issues.

4. Operation of IP-related project

While the majority of respondents answered that they do not operate IP-related projects, two answered positively. Being aware of the importance of intellectual property rights in relation to ICH, Korean respondent has conducted a research titled “Concepts of Intangible Cultural Heritage and Their Protection from the Perspective on the Intellectual Property Right” in 2011. It was motivated by the fact that, as ICH has recently been used in various ways to make economic gains, questions about ownership of and sharing interest derived from ICH were raised.

An Indian respondent conducted documentation and interviews of knowledge-holders, practitioners, and scholars on various issues of ICH. Even though this respondent did not have a case of guaranteeing the rights and participation of ICH subjects, it ensured that appropriate permissions should be secured from copyright owners to prevent any infringing their copyrights.

E. Intellectual Property Issues in the Process of Information Building and Sharing

1. Overview

Everyone working in the ICH field may know that intellectual property is important in ICH activities but not so many seem to know how it may be applicable to ICH effectively. It is because it is not a pure term used in the conventional cultural sector in part and it has somewhat unfamiliar contents for cultural sector workers in the other part. In fact, intellectual property

concerned. In addition, an exemplary case has been made by a Korean respondent, National Research Institute of Cultural Heritage (NRICH). By being aware of importance of intellectual property rights, NRICH conducted an academic research project on intellectual property rights in order to analyze the protection and limitation of patent rights, copyrights, and trademark rights of ICH. Such an activity can be helpful to establish responsible unit or secure relevant personnel in the ICH related institution/organization in the future.

issues can arise in every corner of process of information building and sharing of intangible cultural heritage.

The issue may first be raised in the preparation stage of information building and sharing. In some cases, bearers of ICH may not want their cultural heritage opened to the public or outsiders.³⁷ Issues of human rights and moral issues can arise in the stage of collecting information.³⁸ Commercial misappropriation or exploitation can occur after ICH elements are published or disseminated to the public. There are more issues of intellectual property in relation to ICH activities but awareness or recognition of such issues is not well organized in the ICH field. That is the reason this survey is conducted.

2. Respondent's relationship with ICH subject

Among the answers from respondents, one notable answer is that the respondent's relationship with ICH subjects is a two-way symmetry through which it provides a platform to the subjects to disseminate their knowledge and generate content through this method.³⁹ Another notable answer is that the respondent asks bearers or practitioners to entrust the NRICH with intellectual property rights of the documentation results for public use and publication.⁴⁰

3. Respondent's vision, purpose, function, policy, etc. included in the intellectual property issues

³⁷ One of these examples is the Tulaip case in the United States. In this case, a U.S. Court applying Indian customary law, awarded remedies to the Tulalip Tribes, indigenous peoples in Washington State, for breach of confidence when the tribal confidentiality named StoryBase, a digital collection of traditional knowledge, was disclosed. Another example is an Australian case, *Foster v. Mountford and Rigby Ltd.* (1977). In this case, the court prevented publication of a book that contained aboriginal people's secrets. The court reasoned that the publication of the book may "undermine the social and religious stability of their hard-pressed community."

³⁸ Moral rights can only be held by individuals. Groups and communities cannot claim moral rights in their work. In 2000, Australia by amending its Copyright Law of 1968 newly stipulated moral right clauses. See Copyright Law of Australia part IX. In this amendment, moral right is defined as: (1) a right of attribution of authorship; (2) a right not to have authorship falsely attributed; or (3) a right of integrity of authorship.

³⁹ Indian respondent.

⁴⁰ Korean respondent. This activity was made on the occasion that the respondent previously published documentary books on ICH as a part of an ICH documentation project. These books described the entire process of technical and artistic skills exercised or performed by the bearers and the books include photos.

Only a few respondents answered this question, indirectly. A respondent makes it a rule to have a letter of copyright entrustment from practitioners when it conducts general survey projects in ICH such as recording ICH elements, for instance.⁴¹ Such a letter is interpreted as a sort of permission and entrustment of copyright to a public entity and does not raise a question about infringement because it may be considered a fair use.⁴² This is a good policy example but the respondent does not have a policy for the case of commercial use of ICH elements by a private entity.

4. Respondent's experience in a legal dispute case in relation to activities of information building and sharing.

Only one respondent answered this part of the questionnaire.⁴³ The respondent demonstrated two cases - one was about a dispute over allegedly identical skills of craftsmanship in traditional shoe-making and the other was about disputes over alleged infringement of a patent right in traditional bell-making skills.

For the first case, the question arose as to when a provincial government published a documentary book about a craftsman's skills in traditional shoe-making. However, the skills in the documentary book were the same ones that were already authored by a person. The latter skills were borne by a craftsman who was already designated as a state-level bearer. The earlier publisher alleged an infringement of copyrights and petitioned it to the respondent, NRICH. The respondent arbitrated the case through the relevant law that allowed a dual designation system between the state level and a provincial one. It was because the law concerned put more emphasis on disseminating traditional knowledge and skills rather than granting exclusive intellectual property rights to a specific bearer.

For the second case, a question arose when a patent was granted to a bearer of cast iron bell-making techniques. After knowing the fact, another bearer of a state-designated living human treasure of the same techniques filed a suit to invalidate the former's right by reasoning that the granted patent was a traditional technique rather than the grantee's invention. The latter won the case.

5. Respondent's experience in guaranteeing the rights and participation of ICH subjects in IBSA activities

⁴¹ Korean respondent.

⁴² Id.

⁴³ Id.

Among the respondents who answered this question, they expressed some future plan of guaranteeing rights and participation of ICH subjects in the information building and sharing activities rather than demonstrated a specific experience or case.

A respondent demonstrated a specific procedure to guarantee the rights of main ICH subjects and also ensure their participation in the course of conducting documentation of ICH as part of information building and sharing activities.⁴⁴ This procedure describes required actions stage by stage in the course of documentation work.⁴⁵

F. Legislation for Protecting Cultural Heritage

The key question in this section is whether countries of respondents have intellectual property law or legal system that can protect rights in relation to intangible cultural heritage. It is the question about current law beyond the conventional protection of intellectual property rights already embedded in the existing legal system. The majority of respondents answered positively that they had intellectual property-related laws. Among them, three respondents mentioned their law or legal system in relation to rights of cultural heritage.

However, methods of protection vary. One of their laws protects both tangible and intangible cultural heritage but excludes copyright and its neighboring rights.⁴⁶ Another also protects intangible cultural heritage in general but it is not clear if the protection includes intellectual property rights in ICH.⁴⁷ The other protects a relatively wide range of intellectual property rights in ICH.⁴⁸ It covers not only traditional cultural expressions but also traditional knowledge.⁴⁹

⁴⁴ Korean respondent. Even though this elaborate procedure looks somewhat complicate or cumbersome, it can be a good example of a guideline in guaranteeing the rights of ICH subjects for doing information building and sharing activities.

⁴⁵ See diagrams in the relevant part of Korean respondent's answer sheet.

⁴⁶ Kazakh respondent.

⁴⁷ Korean respondent.

⁴⁸ Mongolian respondent.

⁴⁹ Mongolian respondent explains that "currently, more than 100 tradition-based inventions in the field of food industry (meat and dairy products), medicine, and medical compositions based on traditional medicines are protected by patents. Innovative artistic designs based on folkloric themes are protected by design patents.

G. Future Plans

This section of the questionnaire asks whether each respondent has a plan for making guidelines/regulations or preparing a project for protecting ICH-related intellectual property rights in the processing of information building and sharing. Three respondents answered positively in this section.

One respondent has plans for organizing guidelines or regulations for protecting intellectual property rights in ICH and related rights in the process of information building and sharing.⁵⁰ It also has plans for projects regarding the protection of intellectual property related rights in order to ensure that there is fair and equitable sharing of benefits from the use of genetic resources.⁵¹

Another is in the process of formulating guidelines and policies for protecting intellectual property related rights in ICH.⁵² It is also drafting the overall terms and conditions, license for contents sharing, consent from for authors, performers and other knowledge-holders in compliance with the its own country's copyright laws, privacy for users, and legal remedies in case of violation of terms of use. This work is made in consultation with external IP experts.⁵³

Yet another is currently in pursuit of a legislation which will include provisions about protecting intellectual property.⁵⁴ It also has a plan to conduct an academic research project for the protection of ICH intellectual property.

H. Other Opinions

Five respondents gave opinions. Among them, some suggested some notable opinions: (1) respondent's government should assign to its relevant ministries to work out gaps existing between reality and goals, lack of legal and financial support for bearers of ICH, low awareness index in the questions concerning intellectual property rights, and a dysfunctional

Trademarks as well as certification marks and geographical indications are used for protection of traditional medicine and technology.”

⁵⁰ Fijian respondent.

⁵¹ See survey report from idem respondent.

⁵² Indian respondent.

⁵³ See survey report from idem respondent.

⁵⁴ Korean respondent.

system of providing legal expertise and proper training courses for the personnel of the ICH-related institutes and communities concerned, among other things;⁵⁵ (2) In order to develop issues of intellectual property rights related to ICH, a progressive action plan is suggested. The action plan covers organizing nation-wide research in intellectual property rights, to nation-wide long-term discussions through participation of relevant institutions and media, to working out the policy of IP rights and to developing guidelines on protection of ICH-related IP rights;⁵⁶ (3) The coverage of protection of IP rights in relation to ICH should be extended to the area of religion rather than limited to secular cultural heritage;⁵⁷ and (4) Experienced countries are invited to support less experienced countries to implement projects and build policies for protection of IP rights in ICH aspects.⁵⁸

II. Assessment

A. Participants of Survey

The majority of respondents who participated in the survey were public institutions, including a government body. With the relatively short history of awareness of safeguarding of ICH both at the international and national level, it may not be easy for private institutions to be active in safeguarding activities, especially in a developing country.⁵⁹ The reason more public institutions are involved in dealing with the ICH issue is that the ICH Convention imposes a duty on each state party to take the necessary measures to ensure the safeguarding of ICH at the national level.⁶⁰ Therefore, while bearing in mind that more private institutions should be involved in ICH related activities, participation of public institutions in information building and sharing of ICH are taken for granted.

B. Respondents' Activities in Information Building and Sharing

With regard to activities in information building and sharing, survey participants have made considerable efforts in information building and sharing of ICH in their respective countries. Activities in this field include

⁵⁵ Kazakh respondent.

⁵⁶ Kyrgyz respondent.

⁵⁷ Sri Lankan respondent.

⁵⁸ Vietnamese respondent.

⁵⁹ However, Indian respondent, Sahapedia, is private not-for-profit institution .

⁶⁰ See Convention for the Safeguarding of Intangible Cultural Heritage art. 11.

identification, documentation, inventory making, databasing or archive building, publication and distribution, utilizing digital contents, and other activities. Other activities were demonstrated as holding workshop, training experts, or exhibitions, among other things.

Activities in information building and sharing of ICH are a loosely-made sequential process in their nature. It is because, for instance, inventory cannot be made if some ICH element is not identified or documented first. Furthermore, archiving or publishing of ICH activity will be far from being effective if inventory is not made properly. Thus, individual activities are successively connected each other.

Each activity in the course of information building and sharing of ICH plays an integral part of the whole safeguarding activities. Each gives effects to others. In many cases, activities for databasing or archive building cannot stand alone if other activities such as documentation or inventory are not made in the early stage. Therefore, activities in information building and sharing of ICH must have a context rather than made independently or randomly.

Respondents of the questionnaire in this section answered rather actively. They demonstrated various activities; however, context in their activities is not found well. In order to put these kinds of activities into practice, there must be a planning or project before a certain activity is initiated. Such a planning or project should desirably be made through a sequential order as mentioned above. Many respondents answered they did identification and then archive building after omitting documentation or inventory making, for example. Systematic plan of activities are truly recommended.

Securing human resources in a responsible office in ICH activities is another homework that should be accomplished by responsible institutions for ICH safeguarding as soon as possible. Trained or specialized manpower in the field of intellectual property rights in ICH will play an important role in promoting the safeguarding of ICH.

C. Awareness of Rights of Intellectual Property in ICH

A question about in what degree a respondent is aware of the importance of intellectual property rights in safeguarding intangible cultural heritage can be a yardstick to know about how safeguarding of ICH can be made. Rights of

intellectual property in relation to ICH are somewhat vague to delineate the coverage and thus not well defined in the present legal system in general.

Individual activity for information building and sharing of ICH consists of overall safeguarding measures for ICH. It is also an independent but processional measure to reach the goal of safeguarding of ICH at the same time. In doing so, each individual step in the course of information building and sharing are often times exposed to legal and humanitarian issues. Therefore, awareness of such issues by stakeholders is very important.

The most important issue in relation to activities of information building and sharing is about prior informed consent or approval. The consent or approval must be made without coercion, with sufficient time and with relevant information before any action is taken. This issue can occur, for example, when an element of intangible cultural heritage is taken for record or picture by non-bearers.⁶¹

In addition to the above, issues of secrecy, sacredness or confidentiality may also be raised. A bearer's moral rights can often be violated in relation to other IP infringement issues, such as unfair use or misuse of material. A question about benefit sharing may be raised if taken ICH material is commercially used. In limited situations, if ownership is granted to an ICH holder, infringement questions can also be raised. Aside from these issues and questions, more intellectual property rights closely related to ICH activities exist.

To be aware of such issues, relevant workers for intangible cultural heritage must know about what elements could be related to intellectual property rights while they are working for information building and sharing. In addition, institutions must have a plan or project in order to make guidelines or internal regulations that can protect intellectual property rights of ICH bearers. These guidelines and regulations will also help ICH workers understand how to work without infringing human rights or intellectual property rights.

At the national level, one idealistic method to secure intellectual property rights in ICH is legislation. Awareness of intellectual property rights in information building and sharing may trigger legislative actions in a country.

⁶¹ This issue of free, prior and informed consent was initially discussed in the United Nations in relation to rights of indigenous people but it is now also applied to all activities about ICH.

Therefore, the kind of legislation a state party has or the kind of action or plan for legislation a state party has can be a gauge to observe in what degree a state party is aware of the importance of intellectual property rights in ICH.

At the international level, aside from the ICH Convention and other normative declarations, such as United Nations Declaration on the Rights of Indigenous People, there are no clear-cut guidelines or model laws for intellectual property rights in view of the safeguarding of intangible cultural heritage. This is because of the relatively short history of the development of ICH intellectual property law in an environment of a rigid legal system that sustains conventional intellectual property law concepts.⁶² However, some documents, treaties, and reports made by international organizations and scholars may help to make guidelines or regulations.⁶³

From the analysis of the questionnaire, only a few respondents have a unit and a specialist to handle such a plan or project, while the majority does not have either. The majority of respondents also do not have a proper unit and trained persons in intellectual property issues for two main reasons. One is that the history of the awareness of safeguarding intangible cultural heritage is relatively short. The other is that intellectual property rights in ICH have not been clearly delineated in the present legal system. In these circumstances, the majority of state parties of the ICH Convention as well as institutions concerned are not ready to take full-fledged actions for the safeguarding of ICH yet.

⁶² In this environment, some preceding legislations can be a good reference for a country to legislate IP related rights. They are, for example, moral rights stipulated in Australian's Copyright Copyright Amendment Act of 2006, New Zealander's Trade Marks Act of 2002, and WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of 2003 which is a comparative summary of existing national sui generis measures and laws for the protection of traditional knowledge.

⁶³ These are, for example, WIPO's publication Intellectual Property and Traditional Cultural Expression/Folklore, WIPO's Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions of 1982, and WIPO's Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage, among others.

III. Suggestion

The most important thing to promote the safeguarding of ICH is to construct a strong networking system that can exchange various information on ICH-related intellectual property rights and regional legislation and beyond. By utilizing this networking system and sharing relevant information with one another, member states in the region can gain multiple advantages through synergetic effects.

The other suggestion is to facilitate training programs for ICH workers in the region. Intellectual property rights in relation to ICH are often times touched by sensitive issues such as human rights, dignity, moral rights, ethics, privacy, commercial exploitation, misappropriation, and so on. ICH workers must know how to recognize these issues in the course of their work.

The goal of safeguarding intangible cultural heritage may be far away. It may take decades or more to achieve that goal. There may be so many obstacles in the way to reach the goal. Some may be relatively easy to overcome. Some may be tough. However, whatever difficulties lay ahead, things will eventually be solved if steady steps are taken from the beginning.