



Intellectual Property Rights in Intangible Cultural Heritage

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Introduction

I congratulate Korea's Intangible Cultural Heritage Center for Asia and the Pacific (ICHCAP) for having received category II status at UNESCO and many thanks for having invited me to join you in these celebrations. I am delighted to be here on behalf of the World Intellectual Property Organization (WIPO).

I will be addressing the intellectual property (IP) dimension of safeguarding intangible cultural heritage (ICH), with a particular focus on the IP issues that arise before, during and after the documentation of ICH.

First, however, I will clarify the terms I'll be using. In IP and ICH discourses we tend to use terms a bit differently, so it's useful if I clarify what I mean by certain terms when I use them. I will discuss very briefly some of the policy issues and the legal challenges linked to the IP protection of what we call 'traditional cultural expressions', which we regard as a subset of ICH. I will introduce and describe briefly the normative work underway at WIPO. WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) has recently been handed its strongest mandate yet to undertake 'text-based negotiations'

with a view to developing an international legal instrument. And, then, I will revert to the documentation question, and introduce two projects we are undertaking, in particular a community-based documentation training program.

I. Clarification of Terminology

‘Intellectual property’ refers to the creations of the human mind, such as innovations and creations. ‘IP protection’ refers to protecting those innovations and creations from misappropriation, unauthorised copying and unauthorised use. IP protection is provided nationally through national laws, such as the laws of patents, copyrights, trademarks and designs. National IP laws are generally established on the basis of international IP treaties and conventions, most of which are adopted at WIPO.

What’s especially relevant to this discussion is that IP protection refers to protection in a legal sense, that is, protection of intellectual content against unauthorised use. IP protection is therefore distinct from ‘preservation’ or ‘safeguarding’, which have sometimes been referred to as ‘material protection’. Within WIPO’s work and in the WIPO IGC in particular, ‘traditional knowledge’ is used in a narrow sense to refer to the content of technical knowledge related to health, biodiversity, food security and so on. ‘Traditional cultural expressions’ refers to tangible and intangible manifestations of culture and knowledge in artistic forms, such as music, designs, performances, symbols and art.

There’s a significant overlap between the definition of ICH in the UNESCO Convention of 2003 and the two terms that WIPO uses, traditional knowledge (TK), and traditional cultural expressions (TCEs).

Here, for example, is the description of TCEs currently under discussion in the WIPO IGC:

- (a) *‘Traditional cultural expressions’ or ‘expressions of folklore’ are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:*

- (i) *verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;*
- (ii) *musical expressions, such as songs and instrumental music;*
- (iii) *expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,*
- (iv) *tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;*

which are:

- (aa) *the products of creative intellectual activity, including individual and communal creativity;*
- (bb) *characteristic of a community's cultural and social identity and cultural heritage; and*
- (cc) *maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.*

This wording has been developed over several years on the basis of inputs from indigenous communities, Member States and other stakeholders. As you can see, the provision has two parts: the first describes what a 'TCE' is and the second [paragraphs (aa) to (cc)] sets out the criteria that a TCE would need to satisfy in order to be protected (in the legal, IP sense, as I mentioned earlier).

II. TCEs and Intellectual Property: Policy and Legal Questions

It's clear that TCEs ought to be preserved as envisaged in the UNESCO Convention of 2003. They are integral to communal identities. They embody collective values and beliefs. They transmit shared histories and ensure the continued vitality of indigenous and other groups.

The question for IP policy, however, is whether or not TCEs should also be legally protected as a kind of IP? Should TCEs be protected in a similar way as a piece of music is protected by copyright, or an invention is protected by

patent law?

Some forms of TCEs are already protected under the current IP system. For example, contemporary adaptations of pre-existing cultural expressions are protectable as copyright works. Performances of TCEs are internationally protected by the WIPO Performances and Phonograms Treaty of 1996. Recordings of TCEs can also be protected as sound recordings, and there is existing protection for compilations and databases of TCEs.

So the question is, should TCEs that are not already protected, and that may be regarded by the conventional IP system as ‘public domain’ (I put ‘public domain’ in quotes, because the public domain status of TCEs is contested by indigenous communities) be legally protected by some sort of IP-like right? If so, what form should that protection take? And what are some of the policy implications of doing so?

What could protection of TCEs mean?

IP rights can take many different forms. For example, an IP right might be an exclusive property right, such as the economic right that a copyright holder has to prevent or authorise the copying of his or her works.

Or, one may simply vest a right in a TCE to prevent certain uses by third parties. Or, an IP right can take the form of a compensation right, that is, the right not to authorise use of TCEs but to be remunerated if and when they are used by third parties (a ‘use now and pay later’ scheme.) An IP right could also take the form of a ‘moral right’, in terms of which an author has the right to be acknowledged and to prevent derogatory uses of his/her work. One could also protect TCEs ‘defensively’, that is, protect them from any IP right.

In other words, ‘IP protection’ can refer to a variety of forms of protection.

Which approach is best depends on which policy objectives are regarded as the most pressing. Which approach best serves the stimulation of creativity, maintenance of a robust public domain, economic development, the rights of indigenous peoples, the safeguarding of ICH and the promotion of cultural diversity? This is the fascinating policy reflection that is taking place within the WIPO IGC.

III. Normative Developments: WIPO Intergovernmental Committee (IGC)

The WIPO IGC met for the first time in April 2001. All Member States of WIPO (currently WIPO has 184 Member States) participate, as do many intergovernmental organizations (including UNESCO). Over 200 NGOs also participate actively in the work of the Committee. Many of these NGOs represent indigenous peoples, whose views and participation are crucial because they are the developers and custodians of TCEs. A WIPO Voluntary Fund finances indigenous participation in Committee sessions.

New IGC Mandate 2010-2011 and WIPO Draft Provisions

In October 2009, the WIPO Member States agreed, by consensus, to hand the WIPO IGC its strongest mandate yet for 2010 and 2011. Core features of the new mandate are:

- The IGC will undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of genetic resources, TK and TCEs;
- The IGC should have a clearly defined work program. . . including four sessions of the IGC and three inter-sessional working groups in the 2010-2011 biennium;
- The IGC's work should build on the existing work of the IGC . . . and use all WIPO working documents, including WIPO/GRTKF/IC/9/4 (a draft instrument on the protection of TCEs, first developed in 2005), WIPO/GRTKF/IC/9/5 (a draft instrument on TK, also first developed in 2005) and WIPO/GRTKF/IC/11/8A (a genetic resources related document, not covered in this presentation);
- The Committee is requested to submit to the 2011 General Assembly the text of an international legal instrument (or instruments). The General Assembly in 2011 will decide on convening a Diplomatic Conference;
- The IGC's negotiations should be 'without prejudice to the work pursued in other fora'.

The draft instrument on TCEs (document WIPO/GRTKF/IC/9/4 as referred to in the new mandate) is based on extensive comments and

experiences of States and communities. It sets out the possible content/substance of an international instrument, and comprises a sui generis form of protection for TCEs – including collective rights, no obligatory formalities and indefinite protection. The draft embraces a ‘no one size fits all’ approach, leaving flexibility for national implementation, and defers as far as possible to customary legal systems and institutions. The draft has been formally adopted by the African Group; while it is not yet adopted or agreed on by all Member States, it is contributing to national, regional and international processes.

The draft instrument for TCEs offer draft articles addressing questions such as:

- What does one want to protect (subject matter)?
- Why does one wish to do so (policy objectives)?
- Which acts should be prevented/subject to prior authorization (scope of protection)?
- Who should benefit from this protection (rightsholders and beneficiaries)?
- How would rights be obtained and lost, managed and enforced (formalities, term, administration)?

IV. Intellectual Property and the Documentation of ICH

It’s clear that documenting ICH is valuable for its safeguarding. Museums and archives and libraries play invaluable educational, scholarly, and preservation roles, as do inventories and lists such as those referred to in the UNESCO Convention of 2003.

What we found, however, in our work on IP and ICH, is that indigenous peoples and other holders of TK and TCEs argue that sometimes the documentation of their knowledge and cultural expressions by others, however well-intentioned, can inadvertently undermine their IP interests. For example, they may not wish for their photographs of their sacred cultural expressions to be disclosed to third parties, or for recordings of their music to be copied and commercialised by a third party. So we’ve found that indigenous groups have for some time questioned how issues of ‘authorship’, ‘ownership’ and ‘control’ should be dealt with in respect of ICH documentation.

As one indigenous leader said some years ago, ‘the crux of the problem is that information about us is not owned by us.’ From a legal point of view, the IP rights in recordings of ICH, be it a sound recording, a film, a photograph or a database, generally vest not in the person or community represented in the recording, but in the person who ‘made’ the recording. This is the person regarded as the ‘author’ under IP law. So indigenous peoples see themselves as merely the objects of study by others and as legally disenfranchised because the persons who document and record their traditions own the IP rights in their output. Indigenous peoples have now for some time been arguing that they should be more directly involved in deciding which aspects of their cultures are documented and in if and how they are represented.

In addressing these kinds of questions, WIPO undertakes several practical projects, as a complement to the normative work of the WIPO IGC.

»PROJECT I

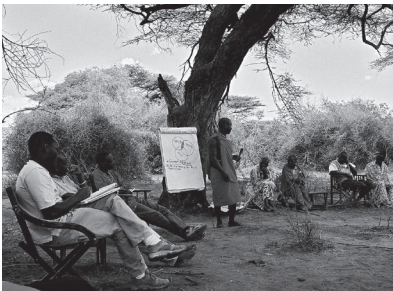
WIPO Creative Heritage Training Program on Cultural Documentation

This is a hands-on training program on cultural documentation, archiving and IP management for indigenous communities. We ran a pilot of this with a Maasai community in Kenya. The project began when the community contacted WIPO and it was led, from the beginning, by the community.

A first consultation was held with the community in October 2006, at the community’s village, in Laikipia, Kenya. This was an important opportunity to consult with the community and the elders in particular. This was key to ensure transparency and to make sure that what we did was guided by the community’s wishes and needs as directly expressed by them. I then contacted experts from institutions that have expertise in cultural documentation and archiving. I was fortunate enough to have worked with experts at the American Folklife Center at the Library of Congress in Washington DC, and the Center for Documentary Studies at Duke. Then, together with our Maasai partners, we developed the course programme, and then the program itself took place, in September 2008. It was a three-week practical training course in documentation, archiving and IP management, and the Maasai trainees received this training in Washington DC, in North Carolina at Duke, and in Switzerland where WIPO is based. They were trained on equipment used

by the American Folklife Center and the Center for Documentary Studies. WIPO purchased a new kit of the same equipment for the community (including a digital camera, a digital sound recorder, and a sturdy laptop). WIPO, the AFC and CDS then visited the community, in order to formally hand over the equipment and provide in situ training, refreshing what had been taught in the USA and in Switzerland. This second visit took place in July 2009. Now that the community owns and can operate the equipment, it is empowered itself to undertake documentation of its traditions – this places the community ‘behind the camera’ and is not only culturally empowering but, as I explained earlier, will also ensure that IP rights in their recordings vest in them, because they made the recordings.

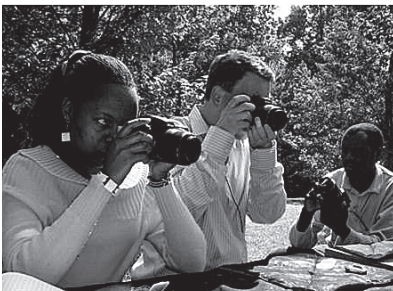
I would also like to add that from the outset we included a representative of the National Museums of Kenya (Lagat Kiprop) in this project. Lagat was an excellent addition to the team, both a trainee and trainer. As WIPO, the AFC and CDS are based overseas, I felt it important that we include local experts who could perhaps provide ongoing support to the community.



First community consultation, October 2006; Laikipia, Kenya. *Photo: Wend Wendland.*



John Ole Tingoi and Anne Sintoya from the Maasai community participating in the training in Washington, September 2008. *Photo: Guha Shankar.*



Training at the Center for Documentary Studies, North Carolina, September 2008. *Photo: Guha Shankar.*



Second visit to the community, July 2009. *Photo: Guha Shankar.*

The program has been very well received by the community. It is of course an experiment. It's ambitious. It harnesses new technologies and lies at the intersection of 'preservation' and 'protection', recognizing their complementarity. The program responds to the wish of the community to be able to have property rights that it can have some control over how the recordings are accessed and used by third parties. The program could also promote cultural diversity, produce local content, stimulate economic development in the community, and promote appropriate tourism. There are many challenges, though. There are logistical challenges, and there are questions of sustainability and scalability. There are legal and policy questions as well.

»PROJECT II

WIPO Guide on IP & Safeguarding Traditional Cultures

While the training program addresses the issues from a community perspective, we have also received many requests from museums, libraries and archives for help in navigating through the IP issues that they come across generally and especially when managing collections of TK and TCEs, such as collections of indigenous music, indigenous designs and indigenous art.

First, WIPO has commissioned surveys of experiences from around the world as to how museums and such institutions manage IP issues particularly in relation to TK and TCEs.

These include surveys of experiences in the Pacific (written by Malia talakai from Tonga) and in India (by Dr. Shubha Chaudhuri of India).

We have a database of existing policies, practices and protocols that institutions use to manage IP questions around ICH documentation. We have, for example, resources on the making of inventories specifically geared towards the UNESCO 2003 Convention. This database is publicly accessible and fully searchable.

Using this data as an empirical basis, we are in the closing stages of preparing a guidebook for museums, libraries and archives on these issues. It addresses complex issues such as who owns collections of indigenous materials? Which legal and ethical rules might apply? How can institutions and tradition bearers work beneficially together? What role does IP

management play?

Two external experts have helped us write parts of the guide, Molly Torsen and Dr. Jane Anderson. And we've just concluded an 'expert review' of the draft where we invited some 30 international experts to comment on the draft which we hope to publish it early next year.

Conclusion

I have tried in this presentation to address the IP dimension of ICH preservation, with reference to the normative work of the WIPO IGC and certain of WIPO's capacity-building projects. In focussing in particular on the question of ICH documentation, I have also drawn some attention to the relationship between the 'preservation' of ICH, the focus of UNESCO, and the 'protection' of TK and TCEs, the focus of WIPO. Documentation exposes some of the tensions between 'preservation' and 'protection', which should, however, be complementary..