

Issues of ICH Communities Involving the Protection of Intellectual Property Rights in the ICH Field

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I. Introduction

We cannot discuss intangible cultural heritage without using the essential term ‘communities.’ Since communities play a key role in practicing and preserving intangible cultural heritage, the word has become a vital part of discussion revolving around the topic. Thus, even though the conceptual meaning of ‘communities’ has not yet been clearly defined, it appears frequently and regularly in discussions regarding intangible cultural heritage. While other terms such as ‘groups’ and ‘individuals’ have been acknowledged as being important, neither subject has been tantamount to that of the term, ‘communities.’

Despite the significance of communities, its importance appears highly diminished when issues of intellectual property rights are raised. Why does such a phenomenon occur? This reason is because of its equivocal status. While a community is a strong holder and practitioner of intangible cultural heritage, its position towards intellectual property rights is inherently weak.

Intellectual property rights are in its nature, rights of property. If someone holds the rights to a property, it is directly related to ownership or possession. The individual may convert this ownership to disposable power. These rights

can also have economic value. However, all the aforementioned issues such as possession, conduct of rights or rights of holder, bear viable meaning only when they nest under the umbrella of protection and remedy of law. Thus, the main focus of this article will be on the legal relationship between safeguarding measures for intangible cultural heritage and communities as owners of the intellectual property rights for the heritage.

II. Conceptual Definition on Ownership of IP Rights

1. Communities

The meaning of 'communities' embraces broad concepts. It could refer to a huge tribe or a number of small tribes spread out over wide ranges of land. It also could be a whole village or a part of a large village. Because of the vague implications of 'communities,' the United Nations Educational, Scientific and Cultural Organization (UNESCO) requested that the Convention for the Safeguarding Intangible Cultural Heritage (intangible cultural heritage Convention) of 2003 give a specific definition. The intangible cultural heritage Convention has yet to give an exact definition of 'communities,' in spite of its frequent usage in the Convention's text. The Intangible Cultural Heritage Convention mentions an even more vague definition as such: (1) a player of an important role in production, safeguarding, maintenance and re-creation of the intangible cultural heritage;¹⁾ (2) an owner of the intangible cultural heritage;²⁾ (3) recogniser of various types of the xintangible cultural heritage;³⁾ and (4) a co-participant of safeguarding activities.⁴⁾

Scholars have also tried to define the meaning of 'communities' in various ways, but they have failed to find a clear definition. UNESCO has given an alternative definition to 'communities,' invented during an expert meeting in 2006.

1_ See Convention for the Safeguarding of Intangible Cultural Heritage (intangible cultural heritage Convention hereafter) preamble para. 7.

2_ Id. Convention art. 1(b).

3_ Id. Convention art. 2 para. 1.

4_ Id. Convention art. 15.

[C]ommunities are networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their intangible cultural heritage...⁵⁾

Not all relevant entities, however, accept this definition. UNESCO's definition is so vague additional words must be defined before interpreting the significance of 'communities.' For instance, it is unclear what 'a shared historical relationship' means or who are people who have a 'sense of identity or connectedness.' Moreover, the interchangeable use of 'networks' and 'communities' confuses the integrity of the definition and opens readers to multiple understandings of the text.

2. Groups

Similarly, the intangible cultural heritage Convention mentions 'groups' along with the term 'communities' without defining it. UNESCO defined 'groups' in the expert meeting.

[G]roups comprise people within or across communities who share characteristics such as skills, experience and special knowledge, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners or apprentices...⁶⁾

If the definition of 'groups' appears to be clearer than 'communities,' it may be because its components are simpler than the former undefined word.

3. Individuals

The term 'individuals' was also defined in the expert meeting.

5_ See Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention, 13-15 March 2006, Tokyo, Japan REPORT 8-9 <http://unesdoc.unesco.org/images/0014/001459/145919e.pdf> (visited 10/06/2010).

6_ See id. Expert Meeting REPORT 8-9.

[I]ndividuals are those within or across communities who have distinct skills, knowledge, experience or other characteristics, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners and, where appropriate, apprentices...⁷⁾

The definition also appears to be clearer than that of ‘communities.’ The reasoning follows the same principle as that of ‘groups,’ that explaining the characterisation of individuals is a much simpler task than that of communities.

III. Actors in Owning Intangible Culture

1. Ownership of Culture in General

Prior to identifying an owner of intangible cultural heritage, we must identify whether a certain person or group can own a certain specific culture. In order to discuss this matter, we must first answer this basic question: ‘What is culture?’

People in general often use the term ‘culture’ as a broad conception in their ordinary life. For example, people mention political ‘culture,’ foreign ‘culture,’ youth ‘culture,’ or traditional ‘culture’ while declining to clearly define what ‘culture’ is. Therefore, it is necessary to define the meaning of the term ‘culture’ in the context of these broad classifications.

Since various sectors use the term ‘culture’ so broadly and widely, culture then seems to belong to a public domain rather than to a certain person or group. If it is in the public domain, it is far from certain traits exclusive to personal property such as ownership, power, value, infringement, and protection. The UNESCO once defined culture as:

[T]he whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value

.....
7_ See id. Expert Meeting REPORT 8-9.

*systems, traditions and beliefs...*⁸⁾

Given this definition, culture is twofold: large elements such as spiritual, materialistic, intellectual or emotional forms exist in a public domain, whereas individual components of culture that consist of large complexes of culture can be a proprietary subject. If a certain culture can contain, absorb, circumscribe or embrace art, literature, life style and tradition, then these components lie on private sectors rather than exclusively in the public domain.⁹⁾ As such, it is not contradictory to grant proprietary rights to people who create culture as art or tradition.

Even though it is somewhat controversial, it may not be reasonable to locate in a public domain an individual art or life style that consists of traditional culture simply because they are named 'traditional' culture. If traditional culture is in a public domain, it may be easy to access by anyone who needs it but it may encounter endangerment of fading-out since it will not be easy to maintain, preserve and re-create traditional culture. In order to avoid such a possible disaster, it is good to recognise proprietary value and grant proprietary rights over individual work as a component of traditional culture so that traditional culture can be maintained and re-created. It is the spirit of the Intangible Cultural Heritage Convention.

2. Ownership of Intangible Cultural Heritage

Another confusing term within the realm of discussion regarding intangible cultural heritage is 'heritage.' Heritage may be contradictory to the conception of intellectual property rights whose tests are novelty in patents, distinctiveness in trademarks and originality in copyrights in general. There might not be room for 'heritage' to nestle in the tests of the intellectual property rights which require freshness or originality.

Generally speaking, heritage means inheritance of a proprietary right or value from a person who has already passed away. It is sometimes used

8_ See Preamble para. 6. UNESCO Mexico City Declaration on Cultural Policies World Conference on Cultural Policies Mexico City, 26 July-6 August 1982. http://portal.unesco.org/culture/en/files/35197/11919410061mexico_en.pdf/mexico_en.pdf (visited 10/06/2010).

9_ For instance, Rock'n Roll culture cannot be an object of ownership of a specific group or person but individual music such as a song of the Beatles or the Rolling Stones as a part of Rock'n Roll culture can be owned by an individual person or group.

with a modifying word such as 'spiritual' heritage in order to stress non-material inheritance; however, it does not have legal meaning if someone inherits something that does not accompany substantive rights. For example, even though descendants have inherited Picasso's genius in art or Hegelian dialectic idea from their ancestors, they are far from being an object for legal protection.

Similarly, in the case that communities, groups or individuals inherit intangible assets from their ancestors, it is clear that these assets are not the ones to be protected by substantive laws or precedent case laws. As for the element of intangible heritage, it does not have practical prerequisites to get under the legal umbrella since it is not identified who the owner of it is and, even if ownership is recognised, it lacks basic legal conditions to be a heritage since there does not exist an expressed devise, bequest or familial relationships. Therefore, the term heritage is nothing more than a rhetoric that does not imply legal meaning in its word itself.

The fact that intangible cultural heritage is out of the legal umbrella means it is a kind of 'public goods' laid in the realm of the public domain. Public goods are something that can be shared freely such as air or natural water. Even if someone wrote a book after citing certain historical facts from the Official Records of the Yi Dynasty of Korea, it would not be an infringement of copy rights. The same is true of someone who sings Arirang, a popular Korean folk song, in a theatre for the audience who bought admission tickets. It is because these are goods are in the public domain. On the other hand, some people make money from exploiting such public goods¹⁰ or obtain exclusive rights through patent application.¹¹

Contrary to reality, communities, groups and individuals as entities that hold, maintain and sustainably develop intangible cultural heritage are

10_ American duet Simon and Garfunkel had made a lot of money from their song Scarborough Fair which was lessened from an England musician who had no right to the song since the song was considered a folk song within the realm of the public domain. The same is true for a Korean folk song named 'Han O Baek Nyeon' which was sung by Yong Pil Cho, one of most popular singers in Korea.

11_ In 2001, two Indians nationals applied for a patent in the United States for a plant named 'turmeric' which has been use for treatment of some diseases. The patent was granted but it was canceled later after a relevant Indian authority for preserving traditional knowledge raised a question about its novelty. See WORLD HEALTH ORGANIZATION, Regional Consultation on Development of Traditional Medicine in the South East Asia Region, Pyongyang, DPR Korea, 22-24 June 2005 By Mr. V.K. Gupta. 1. http://www.searo.who.int/linkfiles/meetings_document16.pdf (visited on 10/05/2010). In this case, the reason for cancellation was not to protect a traditional knowledge; rather, it was lack of novelty. Anyhow, the traditional knowledge was benefited indirectly.

not legally protected, as no legal rights have been granted to them. Should they be satisfied with being successors of the traditional culture that holds and practices intangible cultural heritage while some general people make businesses or garner their fame by commercially exploiting intangible cultural heritage?¹²⁾ In this situation, many members of communities and groups as well as individuals who are directly related to intangible cultural heritage may be apart from their position. If so, the traditional heritage will eventually fade out by losing the opportunity of smoothly succeeding to the next generation.¹³⁾

As discussed above, culture itself belongs to the public domain and cannot be a part of private property. However, individual pieces of work that consist of overall culture can be private property, even though it consists of a part of the public domain, once it is consistent with legal conditions to be an element of private property. In doing so, there must be novelty, distinctiveness or originality as prerequisites in order to have intellectual property rights.

The Intangible Cultural Heritage Convention was born with spirits of recognising ownership in intangible cultural heritage through making an environment to prepare basic legal conditions for intellectual property rights.¹⁴⁾

3. Ownership for Communities

Recognition of ownership itself is not a critical issue in modern intellectual property law. Ownership of an intellectual property right lies on the 'person' who insists it until it is declared by the court. 'A person can only be an owner of intellectual property along with ownership of any other property regardless

12_ In Australia, through an amendment of law recently, if a performer of folklore was not compensated at the time his performance was recorded, he is entitled to the copyright in part over the recorded performance. This legislation is a good sign of progress in recognizing intellectual property rights in intangible cultural heritage. See T. Janke, *Indigenous Intangible Cultural Heritage and Ownership of Copyright* in T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* at 170, 2009.

13_ A new musical play is in preparation with the theme of the Andong Hahoe Mask Dance. The PMC Production led by Mr. Seung Hwan Song who previously produced 'Nanta' is reportedly preparing the new musical titled 'Taal ('mask' in Korean)' through a modern interpretation of the Andong Hahoe Mask Dance. See <http://www.hankyung.com/news/app/newsview.php?aid=2010092030071&sid=01073201&nid=007<ype=1> (10/10/2010 visited). If a copyright has ever been granted over the Andong Hahoe Mask Dance, the producer must have a permission to use it commercially.

14_ See intangible cultural heritage Convention section III art. 11-18.

of whether the person is natural or legal. In some cases, de facto legal person that is short of being a fully legal person can be an owner of property. In this stage, somewhat complicated questions arise when the two different conceptions - ownerships of intellectual property rights and intangible cultural heritage - are mixed in a place.

So who can own intangible culture, and should it be possible to own it? Would it be possible for all residents of Jeongseon County to own the copyrights to Jeongseon Arirang, one of several versions of Arirang? Would it be possible that every national of Swaziland own intellectual property rights to the 'Reed Dance' festival in which all unmarried women above fourteen participate? This issue reverts back to the question of how the term 'communities' is defined.

As discussed above, UNESCO's definition of 'communities' is so vague that no clear understanding exists. The reason UNESCO was unable to clearly define the term 'communities' may be imputed to the fact that so many diverse cultures exist. Therefore, it may not be easy for UNESCO to define the term 'culture' properly. However, maintenance and development of intangible cultural heritage will not be made if a certain type of ownership is not recognised for the heritage. Considering this, a proper definition of 'communities' must be made in order to ascertain elements of communities. This may be the safeguarding spirit of the Intangible Cultural Heritage Convention.

Based on the spirit of the Intangible Cultural Heritage Convention, the most effective way to preserve, maintain and develop intangible cultural heritage may be to obtain a status of legal person.¹⁵⁾ 'Communities' may obtain a status of legal person by way of: (1) a legislative action in a state where the 'communities' belongs to;¹⁶⁾ (2) a judgment through interpretation of relevant law; or (3) forming a corporation or organisation by themselves. There may be another way to have ownership without being a legal person. It could be a type

15_ There are some different voices opposing UNESCO's initiative for intellectual property rights in intangible cultural heritage. For details, see T. Kono, Convention for the Safeguarding of Intangible Cultural Heritage: Unsolved Issues and Unanswered Questions in T. Kono (ed.), Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development at 35, 2009.

16_ See intangible cultural heritage Convention of 2003 art. 13 (d). In this clause, the Convention recommends signatories to take necessary legal measures for safeguarding intangible cultural heritage.

of common ownership by all members of a specific community.¹⁷⁾ However, since this method will undeniably bring out a plethora of complicated legal issues, it may not be best to pursue.

More ideas remain. The first issue involves how to recognise members of a community. The more members of a community, the more difficult it becomes to confirm membership. If a community is huge, such as a city of a region (i.e. Gangneung City of Korea for the Gangneung Danoje Festival), it is certainly not easy to name every member of the community. In the process of confirming members, basic guidelines suggested by UNESCO such as ‘a shared historical relationship’ and a ‘network’ of ‘people whose sense of identity and connectedness’ will be helpful. However, since these guidelines are still vague, detailed criteria should be made by the preparatory organ or supporting authority for forming the legal personality of a community. The Intangible Cultural Heritage Convention in fact recommends such efforts to Member States.¹⁸⁾

After earning legal person’s status, a community may encounter demanding work in order to maintain legal person’s status. There should be a general meeting of all members, board of directors and officers to conduct business. It may be costlier than the time of non-legal person’s status in addition to facing more complex legal questions than before following recommendation from the Intangible Cultural Heritage Convention for Safeguarding. However, such costs should be considered a natural cost for holding and maintaining intellectual property rights. In a nutshell, while having premature safeguarding measures, the first thing to do is to obtain legal person’s status if relevant laws allows.¹⁹⁾

17_ As to multiple persons ownership, there are ‘tenancy in common’ and ‘joint tenancy’ in common law which both have undivided common ownership with other(s). If, for instance, ten persons own a property together through joint tenancy or tenancy in common, all ten persons have full ownership over the property undividedly at the same time rather than have one-tenth of portion respectively. This form of ownership may be good for ‘groups’ rather than ‘communities’ since the latter may have too many members as owners.

18_ See intangible cultural heritage Convention art. 13.

19_ As to how to recognise intellectual property rights in intangible cultural heritage, one is criticising present the approach through a modern legal theory which is allegedly Western Europe-oriented. However, he does not alternatively offer viable propositions. See I. Mgbeoji, On the Shoulders of the “Other’ed”: Intellectual Property Rights in Intangible Cultural Heritage and the Persistence of Indigenous Peoples’ Texts and Inter-Texts in a Contextual World in T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* at 210 and 220, 2009.

4. Ownership for Groups and Individuals

In the case of a smaller community, the question becomes how to obtain a legal person's status in relation to intangible cultural heritage or if they can even be recognised as an owner of intellectual property. The 'communities' example may be applicable to the case of 'groups' in the same manner; otherwise, it can apply for the conception of 'tenancy in common' or 'joint tenancy' as a form of ownership in intellectual property in relation to intangible cultural heritage.²⁰⁾ For the 'individuals' case, there are not any legal barriers for a natural person to be an owner of intellectual property. The only question along with other entities is whether an individual can be an owner of a specific intangible cultural heritage by negating characteristics of the public goods in the heritage.

IV. Relevant Issues

Several barriers exist in order to continuously hold, properly maintain and sustainably develop intangible cultural heritage even after ownership was given and all subject matters of intellectual property rights are satisfied. Once the question about how to obtain ownership by an entity is resolved, the next issue is how to satisfy necessary conditions to be a legally viable intellectual property.²¹⁾ In the case of patent, there must be an 'application' of intangible cultural heritage in order to convert it to a certain 'product' or 'process.' In the case of trademark, 'registration' is required in general. In case of copyrights, it should be 'fixed in any tangible medium of expression.' Otherwise, the intangible cultural heritage will not be protected by law even though an entity such as a community or

20_ The two types of common ownership somewhat differ in the degree of intimacy between or among common owners, relationship to the third party, and inheritance, among other things. Such differences should be discussed when there is a detailed study for ownership of intangible cultural heritage.

21_ The idea itself is not protected by intellectual property law.

individual has ownership of it.²²⁾

Another question involves subject matters of intellectual property. To be recognised as a right of an element of intellectual property, ‘novelty’ in patent, ‘distinctiveness’ in trademark, and ‘originality’ in copyright are required. However, intangible cultural heritage is a traditional culture that has been formed generation by generation. By the nature of traditional culture, it is hard to have characteristics of novelty or originality. This question can be solved by legislative actions in part while trying to re-create the culture in another part.²³⁾

The other consideration is about the misappropriation of exclusively granted rights of intellectual property in intangible cultural heritage. Such misappropriation can possibly be made by a community, a group or individual as an entity of ownership of the intellectual property rights as well as by some members of an entity. The basic idea to give an entity intellectual property rights is to effectively safeguard intangible cultural heritage rather than grant someone privileges that can be misused for a specific entity’s own interest before the heritage is widely enjoyed by the public.²⁴⁾ Therefore, there should be a policy-oriented consideration by the relevant authority.

The last thing to be considered regards the duration of ownership once an intellectual property right is granted over the specific intangible cultural heritage. In the case of American laws, generally speaking and with some exceptions, twenty years of exclusive ownership is granted to the patentee

22_ *Pansori*, traditional Korean narrative song, must have notes. Or sound of the song must be recorded. Motions of dance must be recorded or describe how to dance. These are minimum requirement to be protected by intellectual property law in most countries. However, one exception is in France as its law protects without those minimum requirements to be fixed in any tangible medium of expression. If so, the law of France will be a good example to develop property rights in intangible cultural heritage. See T. Janke, *supra* note 12 at 165.

23_ As one of methods for legislative support, it can be considered to insert a following sentence into the relevant slot of a statute: “In the course of determination of ‘originality’ of traditional culture as appropriately nominated as intangible cultural heritage, relevant authority may grant an originality of the culture in question from the date that national government, provincial or local government granted an ownership on the traditional culture in question.” In addition to such a legislative effort, prospective owner of intangible cultural heritage can re-create or reproduce various versions of the culture in question in order to ascertain originality of the culture in question.

24_ As one of exceptions of infringement of copyrights, there is a principle of ‘fair use.’ It is applicable to non-commercial activities such as education, news report, critiques, satire and freedom of expression. For these activities, it is not an infringement even if someone uses other’s work without copyright owner’s permission. In case of intangible cultural heritage in relation to intellectual property rights, the principle of fair use should be more widely allowed than present exceptions since, in intangible cultural heritage cases, its public nature and historical background should be considered.

from the filing date.²⁵⁾ For a copyright holder, the right endures for a term consisting of the life of the author and seventy years after the author's death.²⁶⁾ If the copyrighted work is made for hire, the right endures for a term of ninety five years from the year of its first publication, or a term of one hundred and twenty years from the year of its creation.²⁷⁾ The same term is granted to an anonymous or pseudonymous work. For the case of intangible cultural heritage, there is a huge question on how to set the terms of endurance for respective traditional heritage elements since the traditional culture has been descending for generations and it will be relaying to the next generations incessantly. With this nature of intangible cultural heritage, is it possible to grant property rights only for limited period of time?

V. Conclusion

As discussed above, several issues exist in recognising intellectual property rights in intangible cultural heritage. However, 'communities' can play only a limited role in the process of recognition because of its dual status. One of its statuses is as a prospective protector of the intellectual property rights while its other status is as an object to be protected by certain safeguarding measures. So many obstacles are on the road for 'communities' to pursue safeguarding measures. In this circumstance, priority mission goes to the relevant authorities that are responsible for the implementation of the Intangible Cultural Heritage Convention and then the 'communities' can effectively do what they need to do after the path to the safeguarding measures is paved. Thus, in this stage, the role of 'communities' is to prepare prerequisites for intellectual property rights as best it can and also take possible measures to eventually garner legal rights over elements of intangible cultural heritage even before a necessary legal environment is made.

25_ See 35 U.S.C.A. §154(a).

26_ See 17 U.S.C.A. §302(a).

27_ See 17 U.S.C.A. §302(c).