

Indonesian Case on the Matters of Intellectual Property Rights in the Process of Inscribing ICH Elements onto the UNESCO ICH Lists

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The goals of the 2003 Convention on Safeguarding Intangible Cultural Heritage are basically to increase public awareness of intangible cultural heritage, and to safeguard intangible cultural heritage.

Intellectual Property Rights regarding Traditional Cultural Expressions, Folklore and Traditional Knowledge, has been a hotly debated issue in WIPO for a decade. This issue becomes complicated when the name or names of the person(s) who created such elements of cultural heritage is not known, for example in the case where such elements were originally created centuries ago, or where the elements are practised by many members of a community or communities.

The ownership of tangible heritage is more easily defined in legal terms than intangible cultural heritage. The ownership of natural or cultural sites or physical artefacts can be defined using existing legal regimens. On the other hand, to specify the ownership of intangible or living cultural heritage, which is by its very nature constantly changing, being recreated, and being practiced by many community members, is not an easy task. In such cases, it is often difficult to apply the Western concept of 'ownership,' which implies the right to exploit and also the right to dispose of ownership to elements of intangible cultural heritage which are practised by many community members. In fact, the term 'stewardship' is probably more appropriate than 'ownership'

in relation to custodianship of intangible cultural heritage. In relation to intangible culture, the term ‘cultural property’ has largely been superseded by the terms ‘cultural heritage’ and ‘intangible cultural heritage.’

I am not qualified or mandated to discuss in depth matters related to intellectual property rights and WIPO. This topic is going to be discussed in depth by other learned speakers in this meeting. I should, however, mention that Indonesia has participated actively in WIPO sessions. Basically, Indonesia recognises that intangible cultural heritage is a source of tradition-based intellectual creations which may generate economic value, and therefore their intellectual property rights should be protected.

The final draft of the 2003 Convention steered clear of specifically regulating intellectual property rights in relation to intangible cultural heritage which are the prerogative of WIPO. Those who drafted the Convention were careful to avoid any possible overlapping of the Convention with any existing or future legal instruments relating to intellectual property rights.¹⁾ However, certain aspects of intellectual property rights are built into the 2003 Convention:

I. Respect of Traditional Rules Regulating Access to Certain Aspects of Intangible Cultural Heritage

Especially those which would be classified as ‘sacred and secret knowledge’ is mentioned and regulated as follows:

- (d) *adopt appropriate legal, technical, administrative and financial measures aimed at:*
 (ii) *ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage*²⁾;

This condition is reflected in the nomination forms for the three lists

1_ Blake, J., 2006, *Commentary on the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage*, Institute of Art and Law, Leicester, p.42.

2_ UNESCO 2003 Convention on the Safeguarding of Intangible Cultural Heritage, Article 13.

established under the Convention.³⁾

I would like to give an example of this. Angklung Buhun is a type of traditional bamboo musical instrument played by the Baduy people of Kanekes village in Banten Province of Indonesia. According to traditional laws, outsiders are forbidden to enter Kanekes village. Therefore, to interview the Baduy people who play Angklung Buhun and to record Angklung Buhun,



Angklung Buhun, played by residents of Kanekes Village, Banten Province, Indonesia.

(Photograph by Gaura Mancacaritadipura © 2009 Centre for Research and Development of Culture)

as part of a nomination file of Indonesian Angklung for inscription on the UNESCO Representative List of Intangible Cultural Heritage of Humanity, the nomination research team, of which I was a member, had to invite some of the villagers outside and take their permission to record their Angklung Buhun music and to interview them outside their village.⁴⁾

II. Form Intangible Cultural Heritage-07

This is a mandatory annex to nominations for the three lists established under the 2003 Convention.⁵⁾ The title of this form is:

Cession of Rights and Register of Documentation Submitted as Part of a Nomination File for the Urgent Safeguarding List or Representative List

The form covers photographic documentation, and audiovisual materials

3_ UNESCO 2003 Secretariat, Form intangible cultural heritage-02, Section 5 c. and corresponding sections in Forms intangible cultural heritage-01 and intangible cultural heritage-03, respectively.

4_ Coordinating Ministry for People's Welfare of the Republic of Indonesia, Indonesian Angklung, Nomination File of Indonesian Angklung for Inscription on the UNESCO Representative List of Intangible Cultural Heritage of Humanity, 2009.

5_ UNESCO intangible cultural heritage Secretariat, Forms intangible cultural heritage-01, intangible cultural heritage-02 and intangible cultural heritage-03.

which are part of nomination files submitted to UNESCO for inscription on one of the three lists established under the Convention. The written parts of the nomination files are covered by existing rules governing the secrecy of UNESCO documents until the time of inscription on one of the UNESCO Lists, after which time, the written documents are made accessible to the public and are uploaded on the UNESCO website.

The operative part of the Intangible Cultural Heritage-07 form is as follows:

Form intangible cultural heritage-07 Cession of Rights and Register of Documentation

Name of nominated element: _____

Submitting State(s) Party(ies): _____

1. I, the undersigned, _____, hereby grant to UNESCO the non-exclusive rights to use, publish, reproduce, distribute, display, communicate or make available to the public, in any language or form and by any means including digital, the following material(s), in whole or in part. I grant these rights to UNESCO irrevocably, for an unlimited period of time and for the entire world.

Photographs (add as many rows as photos)

Identifier	Title or brief caption	Date	Name of the photographer	Credit information: © [year] by _____

Audiovisual documentation (add as many rows as necessary)

Identifier	Title of the film or recording	Date	Name of the creator	Credit information: © [year] by _____

2. I further grant to UNESCO the non-exclusive right to sub-license third parties to use the material(s) in whole or in part, solely for non-profit educational or public information uses.

3. These rights are granted subject to the condition that the respective above mentioned credit, or its equivalent, is provided if and when the material(s) is/are used.

4. I certify that I am entitled to grant all the rights under paragraphs 1 and 2 of this agreement and that, to the best of my knowledge and belief, the material(s):

a) is/are in no way whatever a violation or an infringement of any existing copyright or license; and

b) is/are in no way whatever a violation or an infringement of any customary practices governing access to the heritage depicted or incorporated, and contain(s) nothing obscene, libelous or defamatory.

Date: _____

Name: _____

Address: _____

Signature: _____

(Please sign, return two originals of the Cession to UNESCO and retain one for yourself)⁶⁾

By requiring such forms to be signed with respect to the materials submitted, UNESCO is protecting itself against possible claims of violations of intellectual property rights related to its having acted to ‘use, publish, reproduce, distribute, display, communicate or make available to the public’ such materials.

To this date, States Parties submitting nominations have simply complied and filled in the intangible cultural heritage 07 Form as required. An Indonesian legal expert had once queried a word and a phrase found in the intangible cultural heritage-07; namely, ‘irrevocably’ and ‘for an unlimited period of time.’ Intellectual property rights, or copyrights, are generally granted for limited periods of time, rather than forever.⁷⁾ It is noteworthy that this form only gives UNESCO the right to use these materials, always mentioning of course the name of the person who has created these materials and the copyright holder. The copyright remains with the original holder.

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6_ Form Intangible Cultural Heritage-07, UNESCO Intangible Cultural Heritage Secretariat.

7_ Basuki Antariksa, official of the Ministry of Culture and Tourism of the Republic of Indonesia.

III. Requirement for 'Free, Prior and Informed Consent' by Communities with Regards to the Content of Nomination Files

Another requirement related to intellectual property rights as well as to community involvement is the condition that the nomination file must be accompanied by written statements or other evidence of 'free, prior and informed consent' to the contents of the nomination files.⁸⁾ To date, Indonesia has accomplished this by first presenting the contents of the nomination file (in Indonesian language version) before the concerned community members, seeking their input, and then requesting them to freely sign a bilingual form stating such free, informed and prior consent. A sample of such a form is attached at the end of this paper.

IV. Respect of Intellectual Property Rights in Conducting ICH Inventory - making

Another area of intangible cultural heritage safeguarding where intellectual property rights need to be respected is the area of inventory of intangible cultural heritage. Making a list with descriptions of elements of intangible cultural heritage, especially when this includes photographic and audio visual documentation, and more so if this information is made available to the public, for example by being placed on a website, might in some cases constitute a violation of intellectual property rights.

How Indonesia has gone about anticipating such a possible violation of intellectual property rights in the recent project of the Ministry of Culture and Tourism titled 'Inventory of Intangible Cultural Heritage of Indonesia'⁹⁾ is by including a data field in which the community members agree to the

8_ UNESCO Intangible Cultural Heritage Secretariat, Form intangible cultural heritage-02 for Nominations for the Representative List of the Intangible Cultural Heritage of Humanity, Section 5.b, and corresponding sections in Forms intangible cultural heritage-01 and intangible cultural heritage-03, for the Urgent Safeguarding and Best Practices Lists, respectively.

9_ Ministry of Culture and Tourism of the Republic of Indonesia, in collaboration with UNESCO Jakarta Office, "Inventory of the Intangible Cultural Heritage of Indonesia", bilingual edition (Indonesian and English), 2009, Directorate General of Cultural Values, Arts and Tourism, Jakarta, 2009. Inventory Form.

inventory entry of the respective element. There is also the possibility for the community members to request that the data entry not be made accessible to the public. This would cover the possibility of ‘sacred and secret knowledge’ being made public through an inventory entry. In such a case, the inventory entry would be there, but it would not be accessible by to the public. This is in line with the requirements of the 2003 Convention to respect traditional rules limiting access to certain areas of intangible cultural heritage.¹⁰⁾

V. Agreement for ICH Inventory



Note:

By the agreement of communities/ social groups/ individuals, certain elements of intangible cultural heritage may not be published because they contain sacred knowledge and skill (esoteric), but they will still be inventoried as intangible cultural heritage of Indonesia.¹¹⁾

In summary, the 2003 Convention for the Safeguarding of Intangible Cultural Heritage is more concerned with increasing public awareness and promoting safeguarding activities, than with defining or establishing intellectual property rights over elements of intangible cultural heritage, which comes more in the jurisdiction of WIPO. Nevertheless, we can see from the above four examples that the 2003 Convention has taken into consideration intellectual property rights in the execution of the Convention.

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10_ 2003 Convention on Safeguarding the Intangible Cultural Heritage, Article 13, (d) ii, intangible cultural heritage-02 Form Section 5 c) and corresponding sections in Forms intangible cultural heritage-01 and intangible cultural heritage-03.

11_ Ministry of Culture and Tourism of the Republic of Indonesia and UNESCO Jakarta Office, *ibid*, Inventory Form and Chapter 3.