



Appendix

Summary of Discussion
Profile of Participants

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Safeguarding of Intangible Cultural Heritage and Intellectual Property Rights: Trends and Challenges

Seoul, 21 October 2010
National Palace Museum of Korea

An expert meeting titled ‘Safeguarding of Intangible Cultural Heritage and Intellectual Property Rights: Trends and Challenges’ was held at the National Palace Museum of Korea on 21 October 2010. Experts and observers from the fields of intangible cultural heritage and intellectual property participated in the meeting and sought for ways to safeguard intangible cultural heritage through the promotion of intellectual property.

Mr Tae Yong Choi, Planning Director, Korea Cultural Heritage Foundation and Professor Dawnhee Yim, Chair Professor, Dongguk University, encouraged the participants and hoped for a successful meeting in their opening and welcoming remarks. Then in his keynote speech, Dr Seong-Yong Park, Executive Director of the Intangible Cultural Heritage Centre for Asia and the Pacific (ICHCAP) proposed major issues of safeguarding of intangible cultural heritage and intellectual property.

Firstly, there needs to be an examination on whether intellectual property rights to safeguard intangible cultural heritage can be developed within a comprehensive concept such as traditional cultural resources that have been discussed at the international level. As the revision of the existing intellectual property system a new adoption of the *sui generis* system is required and more proactive policies need to be set up. In particular, it is desirable to protect intellectual property rights as active measures of safeguarding intangible

cultural heritage and furthermore, practical measures relating to intellectual property rights that arise in the process of identification, research and documentation of intangible cultural heritage should be urgently established. At the same time, in-depth discussions on the guidelines or legal regulations to protect holders' rights which are violated by individuals or mass media are required.

The meeting was conducted in three sessions: current discussions on the safeguarding of intangible cultural heritage and intellectual property were discussed in the first session, their issues and tasks were dealt with in the second session and the issues of information technology was addressed in the third session.

»Session 1

Discourse and Trends on Intellectual Property Rights in the Field of Safeguarding ICH at Local and International Levels

Session 1 was chaired by Professor Dawnhee Yim. Panelists included Professor Byung Il Kim, Hanyang University Law School and Mr Yong Gu Kim, Deputy Director, Intangible Cultural Heritage Division, Cultural Heritage Administration of Korea, discussed domestic and international trends regarding the safeguarding of intangible cultural heritage and intellectual property.

Legal Protection for the Safeguarding of Intangible Cultural Heritage

Intangible cultural heritage that has been passed on through generations possess traditional qualities as well as modernity acquired through continuous recreation. This is why the improved parts of intangible cultural heritage belong to the 'private domain' while most intangible cultural heritage belongs to the 'public domain'. In order to protect the intangible cultural heritage, which belongs to both public and private domains, under intellectual property laws, Professor Byung Il Kim pointed out that the following issues should be settled: First, there is no characteristic of who the right holder is to grant them rights; second, the beneficiaries whom to share the benefits are unclear; and third, rules to prevent misuse and distortion of heritage elements are necessary. Pointing out that these three aspects made it difficult for the

‘safeguarding’ of intangible cultural heritage to move toward ‘Protection’, he argued that these issues had to be discussed in detail for the legal protection of intangible cultural heritage.

Prospects for the Protection of TCEs by the Global Society

Mr Yong Gu Kim asked for a long-term outlook on whether the international discussion on the protection of traditional cultural expressions (TCEs) led by WIPO will result in the establishment of a *sui generis* protection system or take place within the existing intellectual property law. Predicting that the role of the Cultural Heritage Administration of Korea could expand if a *sui generis* system were to be established, he asked what role policies could play for the protection of intangible cultural heritage.

To this, Mr Ki Seok Oh, Research Fellow at Korea Copyright Commission, clarified that the WIPO Intergovernmental Committee is taking swift action to establish a *sui generis* protection system mainly for developing countries and the protection of TCEs which, to a certain extent, seems to have already moved on from the existing scheme of intellectual property rights. Consequently, he expects that international trends regarding the protection of TCEs are aimed toward a new instrument that breaks away from the framework of intellectual property rights and it will result in a non-compulsory model law that encourages its admission into a national law.

In relation to this, in his keynote speech, Dr Seong-Yong Park, Executive Director of ICHCAP, pointed out that the inherent limitations of the intellectual property law need to be overcome in order to protect the rights of intangible cultural heritage where revisions or supplementations of the existing intellectual property protection system or the introduction of the *sui generis* system will be required in the near future, active preparations should be organised in advance at the national level.

Conceptual Discussion on Intangible Cultural Heritage, Traditional Cultural Expressions and Traditional Knowledge

Professor Byung Il Kim interpreted intangible cultural heritage as a very wide concept that comprises ‘traditional knowledge in a narrow sense’ which is related to genetic resources and ‘traditional knowledge in a broad sense’ which is represented by the expressions of folklore. However, pointing out that the concept of traditional knowledge (TK) stipulated by international conventions overlaps with that of folklore or intangible cultural heritage, he called attention to the problems that may arise when such conventions were implemented in Korea.

In addition, Mr Yong Gu Kim questioned whether it would be possible to understand intangible cultural heritage as a concept that comprises TK and TCEs. He pointed out that if TK means the essence of knowledge, TCEs can be seen as its outcome and a dualistic policy that connects each element of TK and TCEs to patent right and copyright is expected to be established. Noting that the relationships between intangible cultural heritage, TK and TCEs should be set up in order to establish an integrated policy, Kim asked for the presenter's opinion on this subject.

To this, Dr Dae Seung Yang, Associate Research Fellow, Korea Institute of Intellectual Property, proposed that it is advisable to understand these three concepts as different forms. For example, the provision on 'production' was deleted in the Model Provisions of 1982 as a result of discussions and this change appears to have taken place because traditional cultural expressions are regarded as a concept rather than an object.

Discussions on New Intellectual Property, Traditional Cultural Expressions and Traditional Knowledge

The relationships among traditional knowledge, traditional cultural expressions, and new intellectual property were discussed during the session.

New intellectual property is a concept where the existing intellectual property has been expanded with the development of economy, society, culture as well as science and technology and it is mainly represented in different types of scientific technology, trademark and design. On the other hand, TK and TCEs have been introduced by developing countries so that they can protect their traditional and indigenous culture defensively based on intellectual property rights. Mr Yong Gu Kim raised a question on whether it was adequate to settle TK or TCEs, both of which are different lineage and starting point of discussion, within the framework of new intellectual property.

To this, Mr Yong Ik Jeong, Head of Intellectual Property Division, Prime Minister's Office, pointed out that since the starting points of discussion of new intellectual property and TK/TCEs are different, it is problematic to even discuss whether they can be integrated or not at this point. He continued that such discussion ultimately results in who will take a social responsibility and it is the matter of what our society and government will decide based on a unanimous opinion. For this, he stated that consultation and coordination between the departments and related institutes that have interests in intellectual property rights are required.

»Session 2

Issues and Tasks of Intellectual Property Rights in the Safeguarding of ICH

Session 2 was chaired by Professor Chul-Nam Lee, Chungnam National University Law School. Practical problems and current tasks related to the protection of intellectual property rights of intangible cultural heritage were raised and examples of the US, Australia and India were introduced. Also, the issue of intellectual property rights raised in the inscription process of the UNESCO Representative List was discussed in Indonesia as an example and was followed by a paper on the definition of communities and their role, an actual object of protection under the intellectual property law. Below are panel discussions by Mr Hyung-Jin Kim Esq., Attorney at Law, J&S Law Firm and Mr Weonmo Park, Chief of Information & Research Division, ICHCAP, on the presentations were made in this session.

Intellectual Property Rights of ICH and a Database Plan

In her presentation, Professor Soyoung Yook, Chungnam National University Law School, proposed establishing the database as an alternative to safeguarding intangible cultural heritage under the intellectual property law. In other words, the original form of intangible cultural heritage is maintained with the established data, the protection of newly added creations are also recognised under the intellectual property law and the profits gained by the latter are shared with holders who are recorded in the data.

However, Mr Hyung-Jin Kim pointed out that the proposed alternative is likely to clash with the copyright laws related to digital contents and the legal rights which arise in the process of establishing the database should be taken into consideration. Also, as returning some of the profits to holders can be met with resistance, a system that secures partial profits needs to be established. Professor Yook responded that though benefit-sharing is controversial in its scope and method, benefits will be shared in one way or another if the government accepted benefit-sharing as a policy and this opinion is an idea that can be proposed as a method on this subject.

Meanwhile, Mr Weonmo Park asked about the difference between the existing inventory-making method as a way to safeguard intangible cultural heritage and the establishment of databases on traditional knowledge in order to protect intellectual property rights. Furthermore, he asked for opinions

from a legal perspective whether the results of the safeguarding of intangible cultural heritage, carried out by the Cultural Heritage Administration of Korea through 'designation', can be considered in connection with the methods to protect intellectual property rights proposed by the presenter. Professor Yook responded that the linkage between the intellectual property law and the library system is certainly possible if the system which utilises an inventory as a preceding material when registering patent rights or copyrights is institutionalised.

Roles and Tasks of Communities in Protecting Intellectual Property Rights

An opinion was raised that in order for communities to be recognised as holders of rights, the scope of the communities needs to be defined clearly; however, it is difficult to conceptualise communities. Mr Hyung-Jin Kim pointed out that it is difficult to grant the ownership of intellectual property rights if the definition of communities is not clarified. He continued that the political, biological and anthropological definition of a community should be further discussed. In this regards, Mr Pilho Park Esq. replied stating that "though it is not easy to objectify a community of intangible cultural heritage, there is an alternative to set the group of people who filed the lawsuit as a community".

Mr Weonmo Park asked whether it is possible for holders or groups recognised by the state under the Cultural Heritage Protection Act to possess legal personality when the relationship between the recognition of holders and groups of important intangible cultural heritage in Korea and the bestowal of legal personality to communities, groups and individuals as suggested by Mr Pilho Park is taken into consideration. To this, Mr Park answered that though legal personality cannot be bestowed in principle, it can be made possible through ex post facto judgment.

Inscription on the UNESCO Representative List and Intellectual Property Rights

Noting that confirmation of the original form of the heritage should take place first in order to preserve and safeguard intangible cultural heritage, Mr Hyung-Jin Kim asked how the prototype for protection is decided when intangible cultural heritage has been transmitted in diverse forms.

Before addressing Kim's question, Mr Gaura Mancacaritadipura, 2nd Secretary at the Indonesian National Kris Secretariat, quoted a UNESCO legal advisor's comment: "the Convention for the Safeguarding of the Intangible

Cultural Heritage is not about ownership, but an issue of protection and intellectual property rights, copyright and industrial design laws which should not be considered in the same context as the inscription on the UNESCO Representative List.” Related to standardisation, Mr Gaura Mancacaritadipura responded by pointing out, though the standardisation of the list has not been discussed by the Indonesian government, they are verified by a number of experts before the nomination of their heritage on the list. He also emphasised that inventory-making is not the completion of the safeguarding of intangible cultural heritage, but the beginning.

Mr Weonmo Park reminded the participants of the decision taken by the UNESCO World Heritage Committee that not enough approval was obtained from communities in the process of applying for inscription on the UNESCO Representative List and asked for specific examples regarding how Indonesia obtained consent from communities for inscription on the List.

Mr Mancacaritadipura answered that it is impossible to receive consent from all of the members of communities and the Indonesian government tried to obtain reasonable samples from diverse members of communities. He also added that when communities opposed inscription on the List, the government tried to persuade and help them understand through dialogue. He expressed the main point of his response by quoting the English proverb “You can’t please everyone all of the time.”

»Session 3

Intellectual Property Rights and the Dissemination of ICH Information

Session 3 was chaired by Professor Soyoung Yook, Chungnam National University Law School. Legal issues that may arise from the documentation and archiving of intangible cultural heritage were raised in this session. Professor Jong Ho Choi, Department of Cultural Properties Management, Korean National University of Cultural Heritage and Professor Dong Hwan Yoo, Graduate School of Creative Industry, Andong National University, took part as panelists.

Legal Protection of Important Intangible Cultural Properties and non-Designated Cultural Properties

Stating that he greatly agreed with Professor Chul Nam Lee on the legal issues that may arise from the documentation and archiving of intangible cultural heritage, that is, future tasks concerning the subject matter of protection (object of rights), beneficiaries (subject of rights) and methods of protection (substance of rights), Professor Jong Ho Choi asked two questions on the legal protection of important intangible cultural properties and non-designated cultural properties in Korea.

First, in the case of ‘*Pocheon Makgeolli*’, a typical case of non-designated cultural property, the trademark ‘*Pocheon Makgeolli*’ can no longer be used when it is exported to Japan because a Japanese company has already registered the trademark. In relation to this, Professor Choi asked for an interpretation on this case from a legal point of view. Second, he suggested that if WIPO is focused on ownership, the Korean government, which has an important intangible cultural heritage holder system, should focus on moral rights in intellectual property rights. A response on this was observed at the general discussion session.

Archiving of Intangible Cultural Heritage and Intellectual Property Rights

Pointing out that the digital archive project of national knowledge and information that began in 1997 has been facing difficulties since roughly 2003, due to widespread awareness of copyright, Professor Dong Hwan Yoo analysed main causes which are as follows: first, copyrights of the archives established in the initial stage are unclear; second, if the archives are set under copyright, the registration costs surpasses development costs; and third, a legal system is not catching up with the speed of archives that are being established at a mass scale.

Professor Chul Nam Lee advised that the relationship on legal rights must be dealt with clearly before establishing archives in order to solve the above-mentioned problems. He recommended *Wikipedia* and *Open Source* as good examples of this case and added that disputes over rights do not take place regarding these sites because they include the license phrase which specifies the relationships of rights.

Establishment of Traditional Knowledge Databases and Related Rights

Professor Dong Hwan Yoo reminded the participants that a large part of traditional Korean medicine relies on folk knowledge and asked about the problems that may occur when the Korea Institute of Oriental Medicine establishes a database on folk medicine.

To this, Dr Kwang Kuk Goh, Senior Research Fellow, Korea Institute of Oriental Medicine, answered that although the establishment of databases in the traditional Korean medical encyclopedia, *Dongui bogam*, which belong to the public domain or the traditional knowledge that has received prior consent from a creator is not a problem, the documentation of what belongs to the private domain such as secret medical knowledge should be carried out with the incentive system. At the same time, recording and examination of folk data would be easier and the rights of holders would be respected if the government policy provided support just as with the Living Human Treasures system.

Safeguarding of Intangible Cultural Heritage and its Utilisation

Considering that we must accept the modifications which intangible elements go through during their creation, Professor Yoo argued that it was necessary to understand the mechanism of preservation and application as a chain of values rather than focusing on preservation-oriented policies. Related to this, he asked Professor Eun Jeong Cho to explain her strategy of harmony between the 'preservation' and 'utilisation' of Buddhist cultural heritage in connection with the process of informatisation and digital contents.

With regard to this, Professor Cho pointed out fundamental causes instead of providing a direct answer. She responded that disapproval from the Buddhist community regarding new creations and abstract expressions of Buddhism comes from their past experience when religious dignity was damaged and she could not but agree with their position to seek preservation because the original form that has been modified once has an irreversible characteristic. At the same time, she pointed out that the Buddhist community cannot but maintain a dual position on tradition because today's ethical standard of the preservation and utilisation of intangible cultural heritage varies and is not established properly.

»General Discussion

Promotion of ICH Intellectual Property Rights

The general discussion was chaired by Dr Seong Yong Park, Executive Director of the Intangible Cultural Heritage Centre for Asia and the Pacific. Dr Park pointed out that the international discussion has been led by the World Intellectual Property Organization so far and participation by the Republic of Korea in these discussions was limited. However, he predicted that Korea, an active participant in the safeguarding of intangible cultural heritage will be able to take the initiative in international discussions about intellectual property rights in this field and preside over general discussions on the safeguarding of intangible cultural heritage and the promotion of intellectual property rights.

Clarification of Concepts and Terminologies Concerning the Intellectual Property of ICH

Participants stressed the importance of the clarification of concepts in order to legally protect intangible cultural heritage. When deciding who are the object and subject of rights, a specific definition helps to decide what to include and what not to include. In light of this, Dr Dae Seung Yang argued that the clarification of the concept of folklore, scope of community, and representation is needed.

Professor Jong Ho Choi said that the clarification of various definitions related to intangible cultural heritage should be promoted. Professor Choi expressed his expectation to the participants that it will be possible to produce a more efficient classification based on today's intensive discussion.

Professor Cho asked a question regarding how to conceptualise intangible cultural heritage. She said that apart from taking into consideration the international definition of intangible cultural heritage, the term intangible cultural heritage needs to be defined within the context of the people's life. In addition, she emphasised that the awareness raising of intangible cultural heritage is much needed in society.

Mr Weonmo Park from ICHCAP pointed out that there is a problem with the definition of intangible cultural heritage being used in Korea. He mentioned that the Korean definition of intangible cultural heritage is mainly directed towards arts and crafts and does not include other domains of intangible cultural heritage that are defined in the 2003 Convention.

Furthermore, the term ‘community’ is also interpreted narrowly. Therefore, when inscribing an element to the UNESCO’s Lists, such limited definitions of ‘community’ should include holders and preservation communities.

In addition, the debate on the definition of ‘communities’ was the major point of issue in the general discussion. Dr Dae Seung Yang argued that the discussion on ‘communities’ is closely related to issues of geographical indication of intellectual property and registration of a legal body. He provided an example of certain people in communities being excluded during the process of nomination of an ICH element onto a UNESCO List. In this case, the question of what will happen to other groups or communities arises.

Accordingly, Dr Seong-Yong Park emphasised that although various terms related to intangible cultural heritage have very much been clarified under the 2003 Convention, thorough research on the definitions should be conducted at the national level.

Safeguarding the Intellectual Property of Intangible Cultural Heritage at the International Level

Mr Gaura Mancacaritadipuwara made a comment that the 2003 Convention does not directly regulate intellectual property of ICH, but respects it. However, he said since ICH is not yet sufficiently covered by intellectual property regulations, WIPO and States Parties need to further their efforts in this area.

Promotion of Domestic Discussion

Mr Ki Seok Oh argued that the discussion about the protection of traditional cultural expressions led by the World Intellectual Property Organization (WIPO) will settle into shape sooner or later, he also underlined studies on the scope and beneficiaries of TCEs and cases of distortions and illegal use must be carried out. To be more specific, the beneficiaries of intangible cultural heritage and traditional cultural expressions are represented by communities and indigenous people respectively, and that the relationship between them needs to be established for the sake of protecting the intellectual property rights of intangible cultural heritage while pointing out the different scope of benefits. Meanwhile, he expressed his concern over the necessity of differentiating the methods of building archives depending on whether the purpose thereof is protection or utilisation of traditional cultural expressions.

Professor Yook stressed a point that there is a gap between the actual law that protects intangible cultural heritage and the people’s expectation of

protection. Professor Yook recalled that there have not been any joint projects done by researchers in the field of ICH and law together. Therefore, it would be more beneficial to encourage activities for experts to exchange ideas between these fields to establish a relevant law.

National Policies to Protect Intangible Cultural Heritage

Mr Yong Gu Kim said that, considering the fact that the new intellectual property is discussed in Korea and the Framework Act on Intellectual Property was introduced at the National Assembly, the Cultural Heritage Administration of Korea (CHA) must take part in this discourse more actively. To this end, he said that its next task will be to build a database based on 'Korea's Online Complete Enumeration Survey of Intangible Culture Heritage'. Mr Kim also mentioned that the CHA should prepare for the anticipated issues concerning intangible cultural heritage protection of intellectual property right. (e.g. the issue of granting rights to holders and the issue related to patents)

Professor Chul Nam Lee cited *Pocheon Makgeolli* (rice wine) and *Gyodong Beopju* (liquor) as examples, and presented active and passive measures of protecting intangible cultural heritage. In other words, passive protection measures refer to building the database for defensive protection. He argued that, in order to passively protect *Pocheon Makgeolli*, we must prevent Japan from pirating it and the government must make efforts to this end. Also, Professor Lee suggested that the CHA could share the list of the Important Intangible Cultural Heritage with the Korean Intellectual Property Office in order to protect the holder's right of *Gyeongju Gyodong Beopju*. In this case, we will be able to prevent registration of duplicated patents. Active protection measures refer to granting rights to holders and *Gyodong Beopju* is a representative example. That is, only holders of *Gyeongju Gyodong Beopju* applied for the 'Gyeongju Gyodong Beopju' brand, we can apply for patents to grant exclusive rights to holders. Considering the fact that the policies of the Cultural Heritage Administration, which operate the holder transmission programme to safeguard intangible cultural properties are different than the intellectual property rights system which acknowledges the individual subject of rights, however, he pointed out that the Cultural Heritage Administration needs to contemplate this.

Methods to Move Beyond the Pre-existing Paradigm

On the other hand, Mr Pilho Park argued that one should move beyond the existing paradigm of intellectual property law which hold the prerequisite of originality. In Australia and France, such a movement is already prominent. He also suggested that a model law should be established first and be followed by further discussion. Professor Choi, while agreeing with Dr Park's opinion recommended that ICHCAP spearhead the movement to develop a model law.

Closing Ceremony

Dr Seong-Yong Park, in his closing remarks said that comprehensive and multilateral efforts should be pursued in order to protect the intellectual property of intangible cultural heritage. Thus, both private and public bodies should endeavour to safeguard intangible cultural heritage to move forward. The movement should not be limited to the pre-existing framework. He further implied that Asia and the Pacific are gifted with diverse civilisations and exchanges of culture, and we should put forth efforts to seek more appropriate measures to safeguard this heritage.

Lastly, Dr Park emphasised the need to draw a social consensus, establish a model law, and promote cooperation between experts in relation to this issue. Furthermore, since communities are the core stakeholders of intangible cultural heritage, we should consider communities more carefully while discussing traditional knowledge and traditional expressions.

Dr Park stated that ICHCAP will continue to make efforts to safeguard intangible cultural heritage and promote intellectual property protection of ICH by implementing various activities.