

Safeguarding Cultural Heritage, Protecting Intellectual Property and Respecting the Rights and Interests of Indigenous Communities: What Role for Museums, Archives and Libraries?

By

Wend Wendland¹

Deputy Director and Head, Traditional Creativity and Cultural Expressions Section

Global Issues Division, World Intellectual Property Organization (WIPO)

Geneva, Switzerland

<http://www.wipo.int/>

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Introduction

Museums, archives, libraries, anthropologists, art historians and ethnologists play an invaluable role in preserving the rich cultural heritage of our planet. By recording and making available the music, arts, knowledge and traditions of indigenous communities, these institutions and researchers help to spread a broader understanding and respect for different cultures.

Recent initiatives to digitize and make widely available entire libraries and other cultural heritage and historical collections hold the promise of promoting cultural exchange and diversity; museum, library and archival services; scientific and scholarly progress; educational opportunities; and, creativity.²

¹ Deputy Director and Head, Traditional Creativity and Cultural Expressions Section, Global Issues Division, World Intellectual Property Organization (WIPO), Geneva, Switzerland. The views expressed in this paper are not necessarily those of WIPO or any of its Member States.

² For example, the European Commission recently announced a i2010 Digital Libraries project to digitize, make available and preserve European cultural heritage (see http://europa.eu.int/information_society/activities/digital_libraries/index_en.htm, accessed November 15, 2005).

Yet, indigenous peoples and other traditional communities express concerns that sometimes activities by museums and cultural specialists do not take adequate account of their rights and interests; and that documenting and displaying, say, a traditional song or a tribal symbol, make them vulnerable to misappropriation.

In other words, the very process of *preservation* of traditional cultural expressions can trigger concerns about their lack of *legal protection* against misappropriation and misuse.

These concerns raise searching questions about practices, policies and laws governing access to, ownership of and control over the collections housed in museums, libraries and archives and how these respond to the needs and interests of indigenous communities. While these issues certainly reach beyond the purely legal realm, they raise questions as to the role of intellectual property (IP) laws in this context. IP issues can arise at every stage of the collection of, cataloguing, inventorying, recording, presenting and re-use of cultural materials by cultural heritage institutions and specialists.

While new technologies offer exciting possibilities for enhancing access to and better preserving ethnographic collections, concerns over access, ownership and control become even more pressing as museums and other institutions set up digital libraries of their collections. Furthermore, as indigenous communities turn increasingly from mere subjects of study to new users of ethnographic collections and, above all, active participants in interpreting, presenting and re-using cultural materials, the evolving relationship between source communities and collection-holding institutions and researchers calls perhaps for new approaches and models.³

Cultural institutions, specialists and others are increasingly seeking technical information and advice on these issues with a view to formulating appropriate strategies that take relevant IP issues into account. The World Intellectual Property Organization (WIPO)⁴ is undertaking a

³ See Anderson, Jane "Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use", 2005, draft, on file with author.

⁴ The World Intellectual Property Organization (WIPO) is the United Nations agency responsible for the promotion and protection of creative intellectual activity and for facilitating the transfer of technology in order to accelerate economic, social and cultural development. It has 183 Member States (as at November 12, 2005), who decide on, direct and monitor its program activities.

project in this area aimed at developing IP-related guidelines, “best practices” and model agreements related to the safeguarding of cultural heritage.

Importantly, raising IP questions is not intended to complicate or restrict but rather complement and support the activities of cultural institutions.

Clarifying IP issues and options in relation to safeguarding cultural heritage, with the close involvement of museums, archives, indigenous communities and other stakeholders, could strengthen synergies between the protection of cultural documentation and its preservation, enhance respect for traditional cultures and promote the wider, secure and fair exchange of cultural expressions between the peoples and communities of this culturally rich and diverse world.

What IP-related needs and aspirations have indigenous peoples expressed in relation to the protection of their cultural heritage? And, should museums and archives, which lie at the cross-roads between source communities and commercial and other users, take those needs and aspirations into account in managing intellectual property issues? If so, how? Can museums and other institutions be at the forefront of testing and shaping new emerging legal systems and approaches to protecting the IP interests of indigenous communities?

This paper reports briefly on ongoing work at WIPO on the protection of traditional knowledge and cultural expressions against misappropriation and misuse, and, second, describes some of the concerns indigenous communities have expressed concerning research on and recording and presentation of their cultures. The paper then suggests for discussion some questions and issues related to IP strategies that museums and other institutions might wish to consider. The paper provides further information on the WIPO project mentioned above, and concludes with the wish that ICOM-ICME might wish to contribute its substantial expertise and experience to this project.

Protection of traditional knowledge and cultural expressions against misappropriation and misuse: A brief overview of WIPO's work

Indigenous and other traditional and cultural communities argue that traditional creativity and cultural expressions require greater protection in relation to intellectual property (IP). They

cite a wide array of examples: indigenous art copied onto carpets, T-shirts and greeting cards; traditional music fused with techno-house dance rhythms to produce best-selling “world music” albums; hand-woven carpets and handicrafts copied and sold as “authentic”; the process for making a traditional musical instrument patented; indigenous words and names trademarked and used commercially; and, lack of indigenous control over research into and documentation and presentation of indigenous cultures.

WIPO first began examining the relationship between IP and the protection, promotion and preservation of traditional cultural expressions/expressions of folklore (TCEs) several decades ago. It has an ongoing and active program of policy development, legislative assistance and capacity building in this area, in close coordination with parallel work on traditional knowledge and know-how (TK).⁵ Policy development and norm-building take place mainly within the scope of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Intergovernmental Committee).

In this context, “traditional cultural expressions” refers generally to any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and which are

- (a) the products of creative intellectual activity, including individual and communal creativity;
- (b) characteristic of a community’s cultural and social identity and cultural heritage; and
- (c) 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.⁶

The relationship between TCEs and IP raises complex and challenging issues. Expressions of traditional cultures/folklore identify and reflect the values, traditions and beliefs of indigenous and other communities. Traditional cultural expressions, often the product of inter-generational and fluid social and communal creative processes, embody a community’s history, cultural and social identity, and values. While lying at the heart of a community’s identity, cultural heritage is also “living” – it is constantly recreated as traditional artists and

⁵ See <http://www.wipo.int/tk/en/folklore/index.html>

⁶ See document WIPO/GRTKF/IC/8/4.

practitioners bring fresh perspectives to their work. Tradition is not only about imitation and reproduction; it is also about innovation and creation within the traditional framework. Therefore, traditional creativity is marked by a dynamic interplay between collective and individual creativity. From an IP perspective, in this dynamic and creative context it is often difficult to know what constitutes independent creation. Yet, under current copyright law, a contemporary adaptation or arrangement of old and pre-existing traditional materials can often be sufficiently original to qualify as a protected copyright work. This leads to a key policy question – is the protection afforded by current IP systems adequate or are new *sui generis* measures necessary?

The challenges of multiculturalism and cultural diversity, particularly in societies with both indigenous and immigrant communities, require cultural policies to maintain a balance between the protection and preservation of cultural expressions – traditional or otherwise – and the free exchange of cultural experiences. A further challenge is to balance a wish to preserve traditional cultures with a desire to stimulate tradition-based creativity as a contribution to sustainable economic development.

Addressing these challenges provokes some deeper questions, such as: (i) to whom, if anyone, do or should traditional knowledge and expressions of creativity belong as private property (including collective or communal property)?; (ii) what makes knowledge or a cultural expression ‘indigenous’ or ‘traditional’?; (iii) who, if anyone, can or should enjoy the exclusive right to commercially exploit intangible traditional know-how and creativity?; (iv) should there be legal mechanisms and remedies against demeaning, derogatory or offensive use of, or derivations from, expressions of traditional cultures?; (v) how should assertions of exclusivity and proprietorship be reconciled with a balanced policy approach that encourages cultural exchange, promotes creativity and cultural development, and serves other legitimate goals such as research and education?; (vi) how should IP mechanisms function to complement initiatives in other related fields, such as the safeguarding of cultural heritage and conservation of biodiversity?; and, (vii) what are the appropriate boundaries and role of the ‘public domain’?

These and other questions lie at the heart of intense and ongoing discussions between WIPO’s Member States, representatives of indigenous peoples and traditional communities and other stakeholders. These discussions are complex and sensitive, and the legal, cultural, social,

political and economic questions they address are the subject of rapidly-evolving policy and legislative development at WIPO and elsewhere.

WIPO Member States have recently called for accelerated progress in this area, stressed the ‘international dimension’ of these questions and emphasized that no outcome of WIPO’s work in this area is excluded, including the possible development of an international instrument or instruments. They have also underscored that WIPO’s work should not prejudice developments in other forums.

Draft instruments under discussion

More recent sessions of the Intergovernmental Committee referred to earlier have examined draft principles and objectives⁷ that could shape *sui generis* instruments on TK and TCEs. This approach to protection could recognize, amongst other things, collective interests in traditional know-how and expressions of traditional cultures which are ‘characteristic’ of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the knowledge or cultural expressions.

These drafts include among their objectives elements such as recognizing that indigenous peoples and other traditional and cultural communities consider their cultural heritage to have intrinsic value, promoting respect for traditional cultures, preventing the misappropriation and misuse of traditional cultures, empowering communities, supporting customary practices and community cooperation, contributing to the safeguarding of traditional cultures, encouraging community innovation and creativity, promoting intellectual and artistic freedom, research and cultural exchange, contributing to cultural diversity, promoting community development, precluding unauthorized IP rights and enhancing certainty, transparency and mutual confidence.⁸

⁷ Current drafts were published as WIPO documents WIPO/GRTKF/IC/8/4 (TCEs) and WIPO/GRTKF/IC/8/5 (TK), both dated April 8, 2005, available at http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html. These current drafts emanate from earlier versions which were discussed at length by the Intergovernmental Committee and also underwent an open commenting and review process. In many cases, comments made by representatives of indigenous and traditional communities have been directly reflected in the draft instruments.

⁸ These are among the objectives for TCEs protection identified by Member States, indigenous communities and other stakeholders taking part in discussions within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. See documents WIPO/GRTKF/IC/7/3 (para. 4, Annex II) and WIPO/GRTKF/IC/8/4.

The current draft of the WIPO provisions propose *inter alia* that it might be necessary for certain TCEs for which especially strong protection is proposed, to be notified to or registered with some or other authority as a condition of protection. The draft also suggests certain exemptions for “non-commercial research or private study” and for the making of recordings and other reproductions of TCEs “for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes”.⁹ The draft WIPO provisions are intended to “complement and work together with laws and measures for the preservation and safeguarding of cultural heritage.”

Cultural heritage research and documentation: Needs and expectations of indigenous communities

Indigenous peoples cite numerous cases in which commercial users have exploited cultural heritage collections without seeking the consent of the relevant community, let alone acknowledging the source or sharing the commercial benefits. For example some popular world music albums have included samples of traditional music that had originally been recorded and made publicly available for heritage preservation purposes. This can happen because of the “public domain” character of TCEs, which is the subject of criticism especially by indigenous peoples.

For example, while a traditional song may be treated by IP law as in the public domain, recording that song creates IP rights in the recording, which are held by the person making the recording.

In addition, indigenous representatives argue that indigenous peoples do not have control over research conducted into their cultures, nor over how their cultures are recorded and presented to the public at large. The handling of secret and sacred materials within such collections can be a source of particularly acute concern. The ethnographic collections of museums and other institutions often include invaluable, even unique, records of ancient traditions, lost languages and community histories which are vital to indigenous peoples’ sense of identity.

⁹ Draft Article 5.

Indigenous declarations and other materials prepared by indigenous representatives state that indigenous peoples regard themselves as the “primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future”, and they call for recognition of their rights to control, through exercise of a right to “free, prior and informed consent”, access to and use of their cultural and intellectual property, to prevent derogatory, offensive and fallacious uses of their cultural expressions and to share in the benefits of any commercial use thereof, including the right to negotiate the terms of such usage.¹⁰

In the words of indigenous expert Henrietta Fourmille, (Centre for Indigenous History and the Arts, University of Western Australia), the crux of the problem from an indigenous perspective is that the “information collected about us is simply not owned by us.”

On the other hand, sometimes exercise of IP rights can assist communities to protect their cultural expressions. For instance, the *Toulumne* tribe of California recently used copyright laws to stop the sale of CDs and videos of its sacred dances.

There are other cases in which recording a piece of traditional art, and exercising IP rights in that recording, proved the most effective means of protecting the original work against unauthorized use. For example, in Australia in 1997, t-shirts began appearing in a market depicting images from indigenous rock paintings found in the Deaf Adder Creek region. These rock art images, while ancient, are still highly significant to Australian indigenous life and custom. The original artist was unknown. And the rock art was so old that any copyright would have expired. So the indigenous custodial group had no remedy under copyright against the t-shirt manufacturers. However, drawings and photographs of the rock art images had been published in a study by a researcher funded by the Australian Institute of Aboriginal Studies, Eric Brandl, in 1973, thus creating new copyright. It was from this publication that the t-shirt manufacturers had apparently copied the images. With the help of the Institute and

¹⁰ See, for example, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993; Janke, Terri “Our Culture, Our Future; Report on Australian Indigenous Cultural and Intellectual Property Rights”, 1998; United Nations Draft Declaration of the Rights of Indigenous Peoples (UN document E/CN.4/Sub.2/1994/2/Add.1); Draft Principles and Guidelines on the Heritage of Indigenous Peoples, elaborated by Mrs. Erica Irene-Daes, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights (UN Document E/CN.4/Sub.2/1995/26).

the Brandl family, the indigenous group was able to get the t-shirt company to stop production, claiming infringement of copyright in Brandl's drawings and photographs.¹¹

A role for museums, archives and libraries?

What roles can archives and museums play in addressing some of the concerns with access to, ownership of and control over cultural materials raised by indigenous peoples? How can museums strike a balance between the *preservation* and the *protection* of cultural documentation? Should and could museums and researchers address or advance efforts to respect the IP-related rights and interests of indigenous peoples and other traditional and cultural communities. And how, in this culturally diverse world, can the wider public have greater access to the rich collections housed by archives and museums?

Answers to questions of access, control and ownership are provided to some extent by the existing IP legal framework. In some cases the existing legal framework may not, however, respond in ways that satisfy indigenous communities. For example, as mentioned earlier, some materials might be treated as public domain under the law, but would not be seen so from an indigenous perspective. In other cases, IP tools can be used to protect traditional cultural expressions against misappropriation and misuse, as the examples above show.

Many institutions and professional bodies are developing ethical protocols and policies to complement the law and better address indigenous needs.¹²

Practically, some of the issues that could be discussed further might include:

1. In cases where a museum holds IP rights in its collections:
 - a) how a museum manages, exercises and licenses those rights (such as copyright and related rights in photographs, sound recordings and digital copies) can be significant. When and on what terms should access be granted? Where a museum grants access to its materials so they may be copied, or a license to an external party to produce a

¹¹ To read the full case study, compiled for WIPO by indigenous lawyer Ms. Terri Janke, see *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, (WIPO Publication No. 781).

derivative product such as a calendar or sound recording, should museums ensure, for example, proper acknowledgement of source communities, that the materials are used in ways respectful of those communities' cultural values, and that the communities share in any benefits arising from the use of such materials;

- b) what possibilities might there be for the museum to share ownership of those rights with source communities, or even assign the rights to them? Assigned or even shared IP rights might facilitate community-based development projects where a community could exercise its rights defensively to prevent the misappropriation of its cultural expressions or positively exploit them, if it so wishes. Appropriate management of IP rights, combined with technological protection measures such as encryption tools, might empower a community to participate directly in regulating access to its cultural materials, especially to sacred and secret materials, in accordance with its customary values;
- c) what roles, if any, should or could museums play in raising awareness among source communities as to IP and their IP-related interests.

2. Further, for purposes of existing or newer and emerging *sui generis* systems of protection for traditional cultural expressions and knowledge:

- (a) could the inventories, databases and catalogues established by museums, archives and libraries be useful sources of information to, for example, identify the beneficiaries of such protection, provide information on applicable customary legal systems and institutions and/or help identify uses of traditional materials which might be regarded as culturally offensive to the communities concerned (this is not to suggest that museums would act as arbiters or mediators in disputes, but rather that their records, catalogues and documentation might be useful sources of information for those who do have to decide upon such issues, especially if such records are compiled with this possibility in mind);

¹² See for example the cases referred to in Anderson, Jane "Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use", 2005, draft, on file with author.

(b) to the extent that the protection of traditional cultural expression is dependent on it being registered with some or other office, could museums and archives themselves act as such registries and assist in the management of the relevant rights?

These are of course initial ideas for discussion only and they require much more thought.

WIPO project

WIPO is undertaking a project in response to a widely-expressed need for technical information and a sharing of experiences on these issues.

A first step in this project is the collection in a publicly-accessible database of guides, codes of conduct, protocols and standard agreements currently in use by museums, archives, libraries and researchers from around the world.

The database can serve as a resource for those interested in learning how cultural institutions, associations and researchers are addressing IP issues as they record, catalogue, inventorize, disseminate, present and re-use cultural materials.¹³

This collection of empirical materials and current practices could also serve as a basis for distilling IP-related best practices and developing IP-related check-lists, guidelines and model agreements for museums, archives, libraries and researchers. If there would be interest among museums, a further next step could be the preparation of a copyright guide for museums and other such institutions.

Such work would necessarily require the active involvement of all stakeholders: museums and other institutions; researchers; indigenous communities; professional bodies; IP lawyers, to name only a few.

Such resources may also benefit institutions establishing inventories of intangible cultural heritage, as provided for under the recently-adopted UNESCO Convention on Safeguarding Intangible Cultural Heritage. The UN Permanent Forum on Indigenous Issues has recommended development of these kinds of resources.

Concluding remarks

Clarifying relevant IP issues and options, in conjunction with museums, archives, communities and other stakeholders, could contribute to realizing the promise of promoting creativity and economic development, museum and archival services, scientific and scholarly progress and educational opportunities.

The involvement of relevant institutions and professional bodies is key.

More specifically, this work would benefit from the museums' inputs and advice on questions such as: what IP-related concerns/needs do museums face in practice?; what practical experiences are there?; which kinds of practical IP-related tools would museums find useful?; and, what roles could museums play in helping to develop those tools?

It is hoped that ICOM-ICME will wish to participate in this work and contribute its substantial expertise and experience to it.

Thank you.

13 For the first examples see www.wipo.int/tk/en/folklore/culturalheritage/index.html.