

Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage

A Survey of Codes, Conduct and Challenges in North America

Prepared for the
World Intellectual Property Organisation (WIPO)
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EXECUTIVE SUMMARY

Indigenous communities and developing States have had extensive first-hand experiences with the ways in which ethnographic materials recorded in different formats within their territories have subsequently been misappropriated. For this reason, Indigenous communities today claim a say over whether, how and on what terms elements of their intangible cultural heritage are studied, recorded, re-used and represented by researchers, museums, commercial interests and others. These claims lie at the confluence of technological innovations and the many benefits they offer, on the one hand, and renewed claims by indigenous and local communities and developing States for greater protection of their cultural expressions and knowledge systems, often considered “public domain” by conventional intellectual property (IP) law, on the other. A matter of particular concern is the institutional handling of “culturally sensitive materials” depicting secret or sacred ceremonial practices. Within a complex web of issues, calls for new IP-type standards for enhanced protection of traditional knowledge and traditional cultural expressions (TCEs), and recent institutional digitization efforts enabling instantaneous distribution of ethnographic materials in various media to anywhere in the world, the system of intellectual property is faced with unprecedented challenges, both conceptually and policy-wise. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO) has been set up to discuss some of these issues and possibly develop a *sui generis* legal instrument which, amongst others, reconciles creators’ rights with wide scale accessibility and dissemination of TCEs in today’s global knowledge economy.

Responding to a widely-expressed need for more information on the role of IP in questions of access to, ownership of and control over collections of intangible cultural heritage, WIPO has also initiated the Creative Heritage Project aimed at developing IP guidelines and “best practices” for managing IP when recording and digitizing intangible cultural heritage. These guidelines and “best practices” could be of interest and benefit to communities who wish to prevent the unauthorized exploitation and misuse of their traditional cultures and derive economic benefit from them through community-based cultural enterprises; museums, galleries and other cultural institutions who wish to devise IP-related strategies in support of

their safeguarding, educational and, in some cases, income-generation objectives; and, creators, researchers and scholars wishing to access, study, share and re-use intangible cultural heritage.

This Survey of existing codes, conduct and challenges was commissioned by WIPO as part of this Project. The brief was to gather and consult on existing codes and practices in North America as an empirical basis for the eventual distillation and development of guidelines and best practices which address the IP aspects of managing collections of intangible cultural heritage. This survey is one of several commissions by WIPO; others focus on other regions.

This WIPO Project is a timely and remarkable contemporary project. It faces steep challenges and holds great promises. It is both remedial and prospective. Remedial in the sense that during the first half of the 20th century, Western anthropologists ventured to the rest of the world collecting and documenting what we today refer to as “traditional knowledge” and “traditional cultural expressions”. Local knowledge about the pharmaceutical properties of plants was recorded; secret-sacred rituals were described and recorded; distinctive local music was captured; and, graphic designs on pottery, woodwork and the human body were photographed or copied by drawing techniques. This transfer and fixation of traditional cultural expressions and knowledge took place in a variety of contexts, circumstances and situations, mainly for preservation purposes and scholarly research by Western institutions and researchers. These valuable safeguarding efforts have also led inadvertently to unauthorized commercial exploitation. The WIPO project is remedial in the sense that it needs to grapple with and try to resolve these past legacies.

However, the WIPO initiative also looks forward towards contemporary and future cultural productions by indigenous communities and local cultural centers around the world. Initiatives are underway for local communities to build local capacity so they could eventually undertake their own recordings and distribute, protect and promote them as they see fit, for their own, direct cultural and economic benefit. Through creating and trading in distinctive cultural goods and services, supported by strategic use and management of IP rights, communities can derive cultural and economic benefit from their rich cultural heritage. Clarity on IP options, especially in the digital world, could spur new mutually-beneficial collaborations between institutions and communities, so promoting wider respect

for cultural diversity, facilitating educational and scholarly opportunities, enriching and enhancing museum and archival services and stimulating creativity and community-development. In this sense, the WIPO Creative Heritage initiative is prospective.

The report is structured in two main parts: Part (1) comprises a presentation of the results of the survey, i.e. it is meant to answer the question of the available existing resources in North America which could be considered in the drafting process for a new set of IP guidelines. Part (2) is an analysis of the challenges facing such a venture followed by a set of recommendations of how to overcome them. There are a number of challenges, such as refining the scope of the project, integrating customary laws and notions to a greater extent, clarifying what is meant by the “misappropriation” of TCEs (for example when is a use of a TCE an illegal misappropriation and when is it legitimate borrowing), balancing claims of access against claims of exclusivity and protection, and, finally, finding a common indexical language. The Survey concludes with a number of key recommendations and concluding observations. Furthermore, the Annexes to the Survey contain a range of additional useful resources including information on related research projects, manuals, handbooks and guides, and standard forms, and on the many people consulted during the preparation of the Survey.