

Max Planck Institute
for Intellectual Property and Competition Law

**WIPO Conference on Enabling Creativity in the
Digital Environment: Copyright Documentation and
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**Panel Contribution to Theme IV
Infrastructure Enabling Access to Knowledge**

Adj. Prof. Dr. Silke von Lewinski



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

- Sui generis protection of TCEs currently discussed at international level
- Some laws and regional instrument already provide for protection
- Question in devising provisions on protection: should registration/recording in databases be a condition for protection or be recommended?
 - Certainly: use for interested users to get information
 - However, are databases for TCEs appropriate?



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

■ Particularities of TCEs regarding need for protection

- Against the background of self-determination right: respect for TCEs
 - for spiritual/non-economic reasons (integrity, authenticity, spiritual meaning of certain TCEs), and
 - for economic reasons
 - Already “protected” by customary laws
- Examples:
 - Right to control the use of their TCEs, esp. by prior informed consent



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

■ Particularities of TCEs regarding need for protection (ctd.)

● Examples (ctd.):

- no use in non-customary or offending way;
- no use of sacred or secret TCEs;
- acknowledgement of the source/origin of used TCEs; authenticity need (no misleading indications to consumers about origin)
- no interference with continuing development with their traditions



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

- Particularities of TCEs regarding background of protection: Certain characteristics of indigenous peoples as opposed to western civilisations

- Examples:

- Holistic world view (everything is interrelated, mankind is part of the entire system); integration, sustainable use as a consequence; no “categorization”
- Major importance of relationships with the surrounding world: the land, animals, plants, other humans, spirits, and ancestors, etc.
- TCEs revive such relationships and strengthen self-identity (function is thus different from IP-protection and not focussed on entertainment)



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

- Particularities of TCEs regarding background of protection: Certain characteristics of indigenous peoples as opposed to western civilisations
 - Examples (ctd.):
 - Importance of community/collective rights v. individualistic western concepts (e.g. property vs. custodianship/responsibility for community, free speech vs. often precluded TCEs)
 - Oral cultures (living heritage; even customary law not written); databases thus questionable)
 - Dynamic (living) culture (evolving by practice) (difference from IP-protection for static, given expression)



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

- Discussion of use of registration in databases in the framework of Sui generis laws or models for protection of TCEs
 - Some laws provide for registration as a condition for protection (Panama)
 - WIPO draft articles: earlier documents, e.g. WIPO/GRTKF/IC/9/4 of Jan. 2006) propose protection by prior informed consent only for particularly valuable, and registered TCEs (Art. 3(a)) (but principle of no formalities)
 - Latest status of discussions (doc. WIPO/GRTKF/IC/19/4 and 19/9 of May/July 2011): no registration anymore mentioned; only freedom of formalities (reflecting reluctance of indigenous peoples to databases/fixation/registration).



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

- Discussion of registration in databases: controversial
 - Main discussion in framework of TK, but arguments similar for TCEs
 - Advantages for TCE-protection: more legal certainty for users
 - Disadvantages (for Indigenous peoples)
 - Open databases invite anyone to use TCEs for derived expressions with possibly negative consequences (offensiveness, original TCE indirectly affected, etc.), often against needs of indigenous peoples
 - If TCE was secret: loss of trade secret protection
 - Fixation vs. oral, dynamic nature of TCEs
 - Registration may be too cumbersome and costly for indigenous peoples
 - Extrapolation of one element/TCE from TK-system is misleading



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

- Registration in databases: different possible approaches
 - No registration/documentation
 - Registration/documentation in open databases
 - Differentiation between kinds of TCEs (e.g., sacred/generic)
 - Only restricted access (e.g., of public authorities) to databases, release of data on contractual basis only
 - Should be done only according to consent of beneficiaries of protection, e.g. as in WIPO pilot training program for cultural documentation and IP management



Particular Aspects of Documentation and Access regarding Traditional Cultural Expressions (TCEs)

- Relation with title – “Enabling Creativity” / “Enabling Access”
 - For indigenous communities, “creativity” as such is no goal or activity to be encouraged (function of TCEs!)
 - For them, also enhancing access is not necessarily wished (freedom of expression/free speech is not a concept (comparable to the Western one) from an indigenous viewpoint)
 - Commodification of their TCEs should not be pushed by governments for “development purposes” without consent of owners of TCEs; rather: respect for their claims/needs.

