

Protecting Intangible Cultural Heritage: From Ethical Dilemmas to Best Practice



Martin Skrydstrup¹, ICME Board Member & Wend Wendland², WIPO

Against the backdrop of ICOM's endorsement and promotion of the UNESCO 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* we have advanced our awareness of the inextricable link between tangible museum collections and the safeguarding of intangible cultural heritage. But have we also advanced our understanding of how best to protect intangible heritage against misappropriation and illegitimate use?

> This question is perhaps accentuated in the case of ethnographic museum collections, where Indigenous and other traditional communities often have a stake in the ways in which knowledge about them and their traditional cultural expressions are presented, interpreted and used. Communities express concerns that sometimes safeguarding activities do not take adequate account of their rights and interests, and that recording and making available, say, a traditional song or a tribal symbol, make them vulnerable to misappropriation and misuse by third parties.³

> In other words, the valuable process of preservation of intangible cultural heritage can trigger concerns about its lack of legal protection in the intellectual property sense.

> An important panel entitled "Ethical Aspects of Oral Traditions – Intellectual Property and Cultural Institutions" at the ICME annual meeting (2005) in Nafplion, Greece addressed this issue. Here ICME President Daniel Papuga stated that ethical codes for museums very rarely address intellectual property issues, including ICOM's own Code of Ethics. Papuga suggested that future revision of the Code also encompass intellectual property issues.

> Should ICOM wish to venture this way, it would be advisable, as a first step, to collect, analyze and compare information about current practices, experiences, concerns and aspirations of collection-holding institutions regarding intellectual property. Partly as a service to the museum community, the World Intellectual Property Organization (WIPO)⁴ is currently undertaking initial research and consultations aimed at mapping current practices, identifying intellectual property issues and concerns, and clarifying intellectual property-related options in this field.

> As a first step, existing and publicly-available protocols, guides, codes of ethics and standard agreements which museums, archives and others already use are being collated into an online resource.⁵ A possible longer term objective of the WIPO project could be to distill from this solid empirical basis IP-related "best practices", guidelines, deposit and release forms and agreements.

> Preliminary results of this work in the North American region indicate that an intellectual property perspective is framed by three emerging trends: (1) A transformation in the global knowledge economy, in which museums are digitizing their intangible cultural heritage collections, (2) A changing relationship between heritage institutions and Indigenous communities, where the latter are increasingly active participants in interpreting, recording and presenting their own intangible cultural heritage, (3) Claims by Indigenous communities and many developing countries for new intellectual property-type standards for the enhanced protection of traditional cultural expressions and knowledge. Practical work aimed at guidelines and best practices as described in this article could complement various policy and normative initiatives at international, regional and national levels.⁶

> Two concrete findings of the survey illustrate possible practical responses to these trends. As part of the Library of Congress, the American Folklife Center in the United States participates in the *American Memory online collection project*. One of the Center's initiatives within this program has been to digitize its collection of Omaha Indian music recorded between 1895 and 1897 and in 1983, make it available on the web⁷. This project received permission and guidance from the Omaha Tribal Council and could point towards an emerging "best practice" where IP issues are identified and managed with the full involvement of the tradition bearers and practitioners on the basis of recognition, respect and mutual cooperation.

> In Southeast Alaska, the Sealaska Heritage Institute⁸ has begun to codify their own customary laws addressing access to and control of songs, names, stories, crests, etc. The Institute realizes that their customary laws may in some instances run counter to copyright law, the fair use doctrine and notions of the public domain. The guidelines issued by the SHI prescribe *inter alia* that reproduction of stories and songs must attribute appropriate clan ownership.

> It would be premature to draw lessons from these findings, but we have here two significant examples which indicate that one place to begin thinking about this issue is with the source communities. Possible future guidelines in this field could learn much from local ideas of control and propriety and institutional experiences with digitization efforts. WIPO's related consultations and study on customary laws and protocols might also provide useful community-based guidance.⁹

> It is a daunting task to draft responsible, innovative and equitable guidelines in this field. Nevertheless, museums are ideally placed to contribute to such a task. Why? Because they often find themselves at the crossroads between source communities and their wish for control over access to and use of their cultural heritage where there are researchers and fieldworkers valuably collecting, recording and studying disappearing traditions and cultural expressions; and, private sector interests re-using traditional cultural expressions to meet growing demand for culturally distinct and "authentic" cultural goods and services. This unique position could place ICOM, if it so wishes, at the vanguard of the development of new ideas and approaches in this field.

> Clarity on intellectual property options, especially in the digital world, could enrich and enhance museum and archival services and spur new mutually-beneficial collaborations between institutions and communities, so promoting wider respect for cultural diversity, facilitating educational and scholarly opportunities, and stimulating creativity and community development.

> WIPO has commenced with this phase of fact-gathering and consultation among museum institutions. The work would benefit immensely from the continued participation and guidance of museums, archives and other collection-holding institutions. The WIPO project presupposes that any distillation of intellectual property-related "best practices" and development of guidelines would and could legitimately only take place within an inclusive and consultative process involving a wide range of perspectives, skills and expertise. It is hoped that ICOM will be closely involved in this work.

1. Ph.D. Candidate, Department of Anthropology, Columbia University, New York, USA. Board member of ICOM's International Committee on Museums of Ethnology (ICME).

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

3. See, for example, the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, June 1993.

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 May 17, 2006), who decide on, direct and monitor its program activities.

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

6. For example, see ongoing discussions within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (<http://www.wipo.int/tk/en/index.html>).

7. <http://memory.loc.gov/ammem/index.html> - <http://memory.loc.gov/ammem/omhtml/omhome.html>

8. <http://www.sealaskaheritage.org/>

9. http://www.wipo.int/tk/en/consultations/customary_law/index.html