

# TRADITIONAL CULTURES,

## Indigenous Peoples and Cultural Institutions

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Museums, libraries, archives and other cultural institutions play an invaluable role in preserving and providing access to their collections, an endeavor that can raise a number of intellectual property (IP) issues, especially in a digital environment. Handling collections of elements of cultural heritage, or “traditional cultural expressions” (TCEs) often brings about specific and even more complex IP issues.

Indigenous peoples and traditional communities have expressed concerns that the very process of preserving TCEs, like documenting and displaying, for example, a traditional song or tribal symbol can open the door to misuse or misappropriation.

Using a fictional example, this article illustrates the IP issues involved in safeguarding cultural heritage. It is inspired in part by a case study featured in Dr. Jane Anderson’s “Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use.”

### A Visit to Community X

*In the 1960s, a researcher, Ms. Y, interested in studying traditional cultures and their symbolism, went to community X. During her field visit, she made film and sound recordings of an important ceremony. The recordings featured the respected elder and leader of community X. As Ms. Y made the recordings, she owns the rights to those works and to objects of related rights.*

Ceremony X may be qualified as a TCE. According to the Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore, TCEs are any form, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested.

TCEs are products of creative intellectual activity, including individual and communal creations. They are characteristic of a community’s cultural and social identity and cultural heritage and are maintained, used or developed by that community, or by individuals having the right or responsibility to do so in accordance with the customary laws and practices of that community.

The collections of TCEs held in cultural institutions are priceless records of ancient traditions and community histories integral to indigenous peoples’ identity and social continuity. They reflect a community’s history, traditions, values and beliefs. In many cases, these TCEs have been documented by researchers from outside the community. The rights to that documentation – and the documentation itself – are often not owned by the community, but by those who made the films, recordings, photographs, etc. As a result, communities often believe that because they are not the owners, they have lost control over the content.

*Some 20 years later, the son of the respected elder and leader of community X composed a song about his community. To accompany the song, he decided to make a video clip showing images of his father. While there were not many images of his father available, he remembered that an anthropologist had come to the community many years before, and he eventually located that anthropologist’s recordings at the central national archive. At his request, the archive sent a copy of the recording to the community without enquiring as to its intended use. The son of the leader then incorporated footage of the ceremony in the 1960s film into his own video clip.*

Was there copyright infringement? Not obtaining Ms. Y’s permission meant that incorporating parts

**Handling collections which comprise elements of cultural heritage often means that museums must resolve complex IP issues.**



of the protected recording into the video clip almost certainly infringed copyright. Assuredly, the son of the elder and the archivist who supplied the film excerpts did not realize they were violating the law when the recording was copied and used in the video. Given that the video clip was to accompany a song intended for commercial distribution, it is unlikely that an exception or limitation to copyright could apply, despite the cultural objective behind its making.

*The original film of the 1960s ceremony was significant for the community; they even wished to digitize it and post it on their website. The film was meant to be an educational tool for future generations of the community. The copyright owner, Ms. Y, managed her rights in a strict manner and had firm ideas about who the material was made for, and who could access it. She exercised total control over the material.*

*This made for tense relations between the community and Ms. Y, as well as with the archive that held the original films and recordings. In such circumstances, how should negotiations between the community, Ms. Y and the archive be conducted? How could these seemingly conflicting rights and interests be reconciled?*

Indigenous peoples and traditional communities want to have access to existing material from their culture so that it can be reinterpreted and given new meaning. However, the process of creating new meanings can contravene the copyright owners' rights in the material. Who then should be entitled to make decisions concerning such films and recordings? The researcher? The community? The archive?

Copyright owners may use their works as they wish within the law, and may prevent others from using them without authorization. They have the exclusive right to authorize third parties to use the works, subject to the legally recognized rights and interests of others, which are often embedded in exceptions or limitations within copyright law. But use by indigenous peoples and traditional communities can fall outside the exceptions and limitations of copyright law.

Indigenous peoples and traditional communities have a growing interest in being more directly involved in recording, presenting and representing their own cultures to the public. They also wish to own, control and access cultural heritage materi-

als held by cultural institutions. To answer these needs, WIPO, under its Creative Heritage Project is offering hands-on training in documentation, recording and digitization of intangible cultural heritage for indigenous and local communities and museum staff of developing countries.<sup>1</sup> This is carried out in partnership with the American Folklife Center/Library of Congress and the Center for Documentary Studies, in the U.S. This WIPO program provides the training in documentary techniques and archival skills necessary for effective community-based cultural conservation, as well as IP training and a basic kit of audiovisual equipment provided by WIPO. A pilot project concluded with success with the Maasai community in Kenya (see "Capacity-Building – Intellectual Property and Traditional Knowledge," WIPO Magazine 5/2009).

*Many years later, a couple of musicians with a passion for "world" music visited the archive in search of traditional music from community X. They listened to many, many recordings, and asked for digital copies of some particularly interesting tracks. In granting their request, the archive was fulfilling its mandate to provide access to the public of the valuable collection of X's music. The recordings in question were free of rights, having fallen into the public domain.*

*A few months later, an archive employee, and member of community X, went to the town's disco. To his dismay, he heard a traditional X song fused with techno-house dance rhythms. He then recalled the couple having taken samples from the collection. He was appalled: surely large profits had been made from selling the remix record, and no one had sought the community's or the archive's permission. He knew there had been no royalty payments and doubted that community X had even been acknowledged on the remix.*

## At the border of the IP framework

The valuable processes of preservation and safeguarding (such as the recording, documentation, digitization, dissemination, circulation and publication of TCEs) can sometimes fail to take adequate account of the rights and interests of source communities. This runs the risk of unintentionally making TCEs freely available for use by others, often against the wishes of the source community; for example, culturally sensitive materials may be commercially exploited by others.

## International Negotiations for the Protection of TCEs

Negotiations on the protection of TCEs are taking place internationally at WIPO in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC).<sup>2</sup> The Creative Heritage Project is a practical complement to these negotiations.

Draft provisions<sup>3</sup> for the *sui generis* protection of traditional knowledge and TCEs are currently under negotiation. The provisions seek, *inter alia*, to respond to the needs of safeguarding and to the specific IP aspects of registering and documenting TCEs. For example, the draft contains a provision to the effect that the measures for the protection of TCEs would not apply to the making of recordings and other reproductions of TCEs for the purpose of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes.<sup>4</sup>

In September 2009, WIPO Member States renewed the mandate of the IGC, adopting a clearly defined work plan and terms of reference to guide the Committee's work over the next two years. They agreed the IGC would undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) that will ensure the effective protection of genetic resources, traditional knowledge and TCEs.

A cultural institution's collection might contain sacred or confidential matter that is subject to restricted use under customary laws. For such sacred, spiritual or otherwise culturally significant TCEs, some uses allowed under IP regimes can be considered inappropriate by the community that created the TCEs.

Under conventional IP law, TCEs are often perceived to be in the public domain (see "Archives and Museums: Balancing Protection and Preservation of Cultural Heritage," WIPO Magazine 5/2005). However, broader interests may still be attached to, for example, a traditional song and require careful handling.

### A role for IP

As the above example illustrates, the acquisition, preservation, display, communication and re-use of elements from collections of TCEs raise unique, complex and sensitive questions. Who owns the collections? Who has control over their content? Who owns the IP rights associated with these collections? How should the collections be accessed, managed and used? The list goes on.

The answers may often reside in two simple letters: IP. Any given item in a collection has an "IP status": TCEs may or may not benefit from IP protection. Thus, managing access to and use of collections inevitably implicates IP law, policy and practice.

Cultural institutions lie at the junction between tradition-bearers and the public. In their daily activities lies a unique opportunity to, on the one hand, allow the public to access, use and recreate cultural heritage while, on the other, to protect TCEs and preserve the rights and interests of their bearers.

Many institutions and communities have developed IP-related policies and practices concerning the safeguarding, access, ownership and control of cultural heritage. Such IP strategies often go beyond conventional IP to address "ethical" issues, focusing on changing behaviors, establishing trust and guiding modes of conduct.

WIPO's Creative Heritage Project<sup>1</sup> is developing resources for the strategic management of IP rights and interests by cultural institutions, so as to both preserve and protect cultural heritage. Examples of such resources include surveys on practical experiences with IP in the archival practices of institutions and of indigenous and local communities; a searchable database of codes, policies and practices; and a draft publication on IP management and TCEs for museums, archives and libraries.

1 For more information see [www.wipo.int/tk/en/folklore/culturalheritage/](http://www.wipo.int/tk/en/folklore/culturalheritage/)

2 For more information about the IGC see: [www.wipo.int/tk/en/igc/](http://www.wipo.int/tk/en/igc/)

3 The draft provisions may be consulted at [www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html)

4 See Draft Provisions Article 5(a)(iii).