

Institutional Guidelines, Best Practice and Local Community Management
Strategies for the Safeguarding of Traditional Cultural Expressions

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Abstract

This presentation is divided into three sections. The first will detail the role and function of international guidelines for national cultural institutions that document and hold registries of traditional knowledge and traditional cultural expressions. Drawing upon the recently published WIPO *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, the presentation will look at the historical issues leading the many of the problems that libraries, archives and museums, as holders of the TK documentation and the new TK/TCEs registries, are facing. It will discuss the legal frameworks that govern these collections as well as the additional issues that institutions need to incorporate into their management strategies. These specifically relate to: developing a clear understanding who the legal and historical owners of the material in the collections are, who should have access to these collections, how they should be circulated nationally and internationally, and to what extent institutions are able to and responsible for, generating new and future conversations about TK and TCE management issues with source communities.

The second part of the presentation will draw from specific case studies where international archives, museums and libraries have responded to the new challenges presented by TK and TCEs. It will consider what works and what doesn't and how certain kinds of good and best practices have been developed. These practices point the way for more engaged relationships with institutions and communities from which TK and TCE derives. Whilst not necessarily inscribed in law, but certainly developed because of the gaps and lacks within IP law, these practices are having a profound effect of institutional governance. Not only are they changing behavior within institutions in regards to the management of these collections, but importantly, increasing the value of the collections. Treating TK and TCEs collections as precious and embodied knowledge that requires constant and consistent engagement and dialogue with source communities increases the value of the collections in multiple ways. This second part of the presentation will outline how developing best practices has contributed to changing relationships and the changing value of the collections themselves.

The final part of the paper considers the role of communities in documentation and registration processes. It will discuss some of the emerging strategies that communities are developing as well as what these are in response to. No one community is alike in relation to its history, the traditional knowledge that it most values, its shifts in governance, and its access to resources. Thus this final part of the paper will discuss how to target specific knowledge-management strategies to community specific issues, and how to develop equitable and meaningful relationships between communities and institutions. This is of critical importance for the safeguarding of valuable and irreplaceable traditional knowledge and traditional cultural expressions.

Overall the paper traces the difficult legal problems that national institutions are facing in managing the documentation and registration of TK and TCEs, how these have been addressed by different institutions world-wide and what lessons can be learnt for the future. The final part of the paper returns to the local contexts where TK and TCE

emanates - for it is here that special attention must be given to developing better relationships between different kinds of stakeholders with different kinds of access to documentation and registration technologies. For it is imperative that future strategies must consider both the TK documentation process whilst simultaneously being engaged in supporting the communities from which TK and TCEs derive.

My deep thanks for this invitation to WIPO and to the Public Authority for Craft Industries, the Sultanate of Oman.

Part I – International Guidelines

It is now very clear how important the recording and documenting of traditional knowledge and traditional cultural expressions are. We are at a stage that requires several stages of action – of which this workshop itself is part.

It is important and significant that in the last ten years we have moved through what must have been the first stage for this issue – namely the RECOGNITION that traditional knowledge and TCEs are valuable and require protecting. While this seems obvious now, it was not always the case. We are all gathered here today because we recognize this issue and want to do something about it. What is not so clear, of course, is what is the best way of proceeding. My opinion – which comes from working for a long time on this issues in local communities in diverse countries including Australia, Indonesia, US and Canada, is that we need multiple strategies that are crafted specifically for the range of different interest groups that convene around this issue.

The subject of this workshop is one of the most critical. It does raise complex theoretical questions as well as addressing practical options that many communities and governments alike are eager to see advanced and developed. On one hand documentation and recording of TK and TCEs is an easy step. It does not require any international or national legislation. All one needs is something to document, and something to document it with. However, it shouldn't happen in a policy or legislative vacuum. This is what has happened in the past, and it has created some rather substantial problems. There are some rather critical questions of law and ownership of the document itself that arise both at the

moment of making, and afterwards, that require some more considered thought. A policy and legislative framework that supports documentation can help deal with these issues.

In the past as in the present, the person who does the recording has a large say in what is documented. As those who are in this room today recording these proceedings can attest, there is a framework for the general recording to occur at all, but where the camera moves, who it rests on, who it records, is largely a decision made by the person behind the camera. In the past, who was doing the recording was also involved in establishing and creating the value of the record – for instance, some disciplines were more focused on one part of TK and TCEs and others on another part. This was not only at the expense of other kinds of traditional representations, but this disciplinary logic also failed to see the interconnections of traditional knowledge – and for example the connections between TCEs and GRS. For instance, for anthropologists interested in textiles and their represented meaning and design within the patterns themselves, often only these textiles were recorded. Focus was on the knowledge and meaning in the product and in its making. What was not considered was the technical knowledge around the dyes themselves and how these used within the weaving process, how knowledge about what and where the plant was, how it could be harvested and what social relationships this harvesting engendered within the community.

It really matters that key questions about the OBJECTIVE of the recording are made before the documentation begins. Answers to these questions may vary, but they will provide a good base setting the appropriate conditions for the collecting of important knowledge. Slide 3 Documentation of knowledge from specific and unique cultures is a very old pursuit. What is new is the technology we now have to facilitate better and more comprehensive recordings and the capacity to reflect upon the practices of the past, and moderate them so as to avoid some of the problems that we are still struggling to reconcile.

In some instances, there is still work to go to convince some states that TK and TCEs are valuable, and valuable beyond a simple economic logic. That is that TK and TCEs are

valuable unto themselves and for what they can tell us about culture, humanity and our ongoing struggle to make sense of the world around us.

Once the value of TK and TCEs has been recognized – the next stage of action is to begin processes of safeguarding this knowledge. I say processes because documentation is ONE form of safeguarding. It is not the only one. Documentation only preserves the knowledge in a particular form. It does not, by itself, necessarily support and safeguard the communities from which that knowledge comes. In thoughtful moments, like what we will be hearing from John Tingoi in the next session, documentation can be a vehicle for supporting communities. But it does not do this automatically and this is very important to remember.

So here we are talking about documentation – documentation taking many forms including written documentation, digital and non-digital recording in images and sound. Photographs, video, film, sound recordings are all forms of documentation. There are various ways documentation can be achieved and then collated. Registries are a way of storing the documented knowledge. And this is not a new process.

What is before us are important and exciting discussions. It is important not to lose sight of the objectives here and to also keep an eye out for potential issues that may arise. While there are important overlaps between UNESCO initiatives and WIPO objectives, Brigitte did an excellent job yesterday of discussing the differences – namely UNESCO objectives work to preserve knowledge. But preserving knowledge is not the same as protecting it and creating robust frameworks that enhance and inform those modes of protection.

There are many parts of this puzzle that need to be worked out – especially working out what it is exactly that law protects and what the consequences of this are. While we are told a story about the relationship between IP and economics, this is only one part of a rather larger story. IP law does not only protect material that is economically valuable, but it also brings material into its orbit that does not have obvious and immediate

economic benefits. Copyright law in particular works upon a range of material, some times automatically, that has no obvious or immediate economic benefit. In particular, copyright law works on the FORMS of documentation, regardless of what is being documented. Intellectual property law is also about fostering and nurturing innovative communities and knowledge producers. From its inception it has had a role in helping certain kinds of knowledge communities enhance and develop. This is also a very important objective of IP law to remember.

What I want to talk to you about today is: what rights are generated AT THE TIME of DOCUMENTING and this means for the future life of this documentation. I want to talk about these issues as they are a critical part of this conversation and need to be upfront and dealt with in the development of ANY documentation and recording projects.

Now while I do believe that these conversations about documentation are of utmost importance. I also want to impress upon you all, that what decisions are made at the moment of documentation as well as what happens after documentation has been made are critical to the success of any documentation projects. This is because what happens after documentation can affect who and how this material is accessed and made meaningful now and into the future. As we all know, we cannot know what the future holds. Therefore it is important to lay some parameters and to help those in the future know what our intentions in documenting were. This is where a policy or legislative framework can help guide us. This will help future generations make appropriate decisions about how this documentation should be used and disseminated.

There are numerous examples of material that was not considered valuable 20, 30, 50 or 100 years ago, but that is now unbelievably important and incredibly valuable. But not all this material is available or easily accessible. Some of this material has competing claims for who it is that 'owns' it, and who it is that is responsible for its dissemination. No one was thinking of these questions in the past. Even ten years ago there was little thinking about it. And, as a Professor in a US university that provides training and skills for

documenting cultural heritage, these are still issues that researchers themselves are grappling with.

Thus this paper is directed to the matrix of questions that arise AFTER documentation has occurred. These include – who owns this material? But also where does this material go? Who becomes the custodians of it? Who has access to it? When and how will it be available to the public? Are there circumstances where circulation of this material is not appropriate?

My purpose here is to share with you what kinds of issues need to be considered, what kinds of issues can arise, how can we best prepare for these, and importantly, how do we develop better and more comprehensive relationships now in order to prevent conflicts into the future.

So a key question, which I am sure has resonance in Oman, as well as every other country represented here – is once documentation of TK and TCEs is made – where does it go? Where will it go? Who will be responsible for it now, in 20 years, in 100 years?

Historically and contemporarily, documented materials go into archives, libraries and museums. Archives are document repositories. Registries are a basic archive and databases are the modern archive. Sometimes this material is kept in archives in the countries where the TK comes from. Often it is not – and this is especially the case if the documentation was made by researchers or people from another country. Much documentation winds up along way from home, in institutions far from the original locus of the recording. For digital databases and registries, the questions are a little different, as they can be potentially housed anywhere – and there remains real questions here about the security of servers, of mainframes, and really the longevity of the internet itself as an interface for exchanging material. If our digital frameworks were to become unusable, for some unforeseen reason in the future – what would happen to all this material?. Digital information and documentation techniques have a particular vulnerability because of their form.

Archives, libraries and museums are constantly evolving as new material enters their domain, and they are charged with both safeguarding it for future generations, but also providing ongoing access to it. It hasn't always been an easy task – and in recent years it has become even more difficult with new publics and new user groups making different demands to the material.

Historically, there was very little attention to the source communities from which the TCEs and TK was documented. Many thought that these communities would themselves die out, and that such documentation was the last stage in the demise of a community and a culture. Thankfully, this has largely not occurred, partly because culture is a surprisingly adaptable and robust creature that can sustain and indeed embodies change and transformation. Here in Oman we can see testament to this reality about the respect for the past within the present within the architecture itself, which is both traditional and modern, and thus presents a very sophisticated merging of these.

But, partly because of this presumption of immanent cultural death, those doing the recordings paid very little attention to the subjects of the recordings, to their names, to the authors, to the actual knowledge holders. Many were only interested in the knowledge itself as an extracted and isolated object. Something that could be used by others. This kind of documentation has a name – it is called knowledge mining, where raw knowledge is extracted by secondary parties to be used by third parties for other purposes, in other places. This material was not recorded for those communities, but for others to use for numerous forms of study and analysis. In almost all cases it was taken out of the source communities and placed in locations impossible to reach. This is regretful and now produces many challenges. It means that many of those same communities now come to the archives and museums looking for access to these materials in order to make new and reinvigorated cultural meaning.

We have very important lessons to learn from this history as we embark on new documentation projects.

The emergence of these documented communities requesting access to their cultural material— a range of new and unanticipated problems have emerged for libraries, archives and museums. Namely who OWNS this material? As these questions were not worked out at the time of documentation, these questions are causing all kinds of headaches for institutions world-wide. They are also serving as valuable lessons for what kinds of thinking needs to occur at the time of recording, what kinds of permissions need to be secured, what kinds of agreements or arrangements should be worked out, all of which will have profound and long lasting effects well after the documentation has occurred.

The question of who owns the documentation or the recording is rather complicated, or can become complicated because of a diverse interplay of law. At the core, of course, is intellectual property. The most common forms of documentation – photographs, sound recordings, films, written notes and manuscripts almost automatically enter into an IP network upon their making. Not everything has to be published to secure protection. To the contrary, the act of making itself, (for example a photograph, a sound recording) can vest protection. Not all of these kinds of documentation have the same time periods of protection in themselves or across countries and this is worth remembering and incorporating into the policy framework.

It rather complicates the situation that the subsequent holders of this material – the libraries, museums and archives are seldom the intellectual property owners. But as the contemporary custodians, they have a responsibility to manage the material according to the relevant and applicable laws. They are thus in the unenviable position of navigating a range of laws, interests and ethical considerations.

But dealing with the copyright owners of these documents is one thing. It is quite another dealing with those who have no legal rights, those source communities who are the subject of the recordings or who graciously and generously gave their time and knowledge to others. In almost every circumstance, these communities had no idea that they were surrendering ownership of the material representations of the TCEs to others.

As we heard in the video yesterday afternoon, informed consent is a difficult concept at the best of times, (and I am more than happy to talk further about this concept later) but it is pretty clear that you cannot give your consent if neither you or the person documenting your material knows what will happen to it in the future.

Even on the late 1980s – there was no idea of how the internet would change the circulation of material. I know many communities that are very troubled by the fact that their special ceremonial material is now accessible by everyone. This ceremonial material that includes songs, motifs, designs, was never designed to be accessed by everyone. Within the community it has strict rules of circulation. If there was initial consent to make the recordings (and sometimes there was not even that), no one could have anticipated the way in which such knowledge can now circulate. No one could have foreseen the internet and its circulatory potential. No one could have anticipated how some kinds of documentation have become more valuable than others through this increased circulation. You cannot give consent for a future you cannot predict.

With the range and extent of problems being experienced across institutions world-wide – and because of the legacies of historical documentation projects, cultural institutions were requesting guidance and help. As a response and in collaboration with WIPO, my colleague Molly Torsen and I co-wrote a set of international guidelines for managing and safeguarding collections of recorded TK and TCEs. This document responds to an urgent need, as there is no current law that deals with the complexities of these issues.

I want to stress that these are guidelines to assist archives, museums and libraries in safeguarding and managing their collections and they are not prescriptive. They help in identifying what the legal issues are, and what to do when a problem exceeds the law in a particular area. So for example, the second part of the guidelines goes through very clearly what the intellectual property issues are that any library, archive and museum throughout the world will encounter with their collections of cultural material. These guidelines help people make informed decisions, and this often enables new and equitable relationships between three parties that have not always been treated equally or

fairly. These three parties are the source communities, usually those with no legal rights; the researchers, documenters and recorders, who usually have all the legal rights; and the public, without explicit legal rights, but certainly the constituency who benefits most from the institutions mandate for making work accessible.

These guidelines are not exhaustive. Importantly we all recognize that there is no one solution, because the problems being experienced are quite unique and diverse. For this reason we included a range of examples of best practices emanating from certain institutions to provide instances of adaptability across institutions.

II – Best or Better Practice:

I will just give you two examples: these come from the recent WIPO *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* by Molly Torsen and myself.

1. The Smithsonian Institution and its Global Sound Project

The Smithsonian Global Sound Project, an initiative of the Smithsonian Center for Folklife and Cultural Heritage, was launched in 2005, and aims to make traditional music globally available via the Internet. The collections that the Smithsonian Global Sound (SGS) initiative holds include the entire Smithsonian Folkways collection and the holdings of two regional archives: the International Library of African Music (ILAM), in Grahamstown, South Africa, and the Archives and Research Center for Ethnomusicology (ARCE), in New Delhi, India.

With its interactive features, the Smithsonian Global Sound initiative has been dubbed “the ethnographic answer to iTunes.” In order to use a recording, as opposed to just downloading it, a “Licensing Request Form” needs to be filled in. The condition, however, is that “licenses and permissions are granted on a case-by- case basis and are at the discretion of the Smithsonian Institution. A license fee may be assessed depending on the nature of the proposed use.”

The Smithsonian Institution expressly prohibits the copying of any material (text and image files, audio and video clips) on the SGS website, except for the purposes of “fair use” as defined by United States copyright law. The SGS site notes: “Royalties go to artists and institutions, and honor the intellectual-property rights of composers, musicians, and producers.” In other words, the revenue earned from sales of downloads and subscriptions support the creation of new educational content and are shared with archival partners, who in turn pass on a portion of those revenues to artists and communities. The Director of the Project, Dr. Richard Kurin, has stated: “There are world music stars who mine the traditional music, and the question is, what is the ownership, what is the moral commitment and how much is going back? When we give them the money, that establishes the intellectual property rights.”

2. Australian Institute for Aboriginal and Torres Strait Islander Studies –
Examples of the range of better practice at AIATSIS from memory.

III - PROTOCOLS:

So we have so far talked a lot about institutions and what happens when material is recorded from their perspective, and what kinds of issues need to be reconciled.

But finally, let us turn to probably the most important groups here – the source communities. As I said at the beginning, documentation is not by itself a means for supporting and safeguarding the communities from which TK and TCEs derive. If these communities do not survive, there will be no more TK or TCEs. And given that these communities are holders of some of the most valuable cultural material but are the most disenfranchised when it comes to legal ownership and capacity to assert rights, it is crucial that we think about what kinds of strategies we can develop to enhance and support these communities now and into the future.

As Brigitte also thoughtfully remarked yesterday – the relationships between documentation and the documented community are probably the most important. This has also been the most ignored. We need to change this and we can change this.

One strategy that I have been working on for several years now are the role and function of protocols to safeguard the relationship that communities have to their recorded and documented knowledges. Rather than being written out of the picture, which has been the history, this is a project of keeping communities in the picture and in dialogue with those individuals, institutions and other third parties who seek access to and use of TK.

Protocols are one of the most interesting modern developments in intellectual property law and policy. This is because they are increasingly being used as alternative means for managing access and control of knowledge in contexts where the limits of intellectual property law have been reached. For Indigenous and marginalized communities who have been subject to the extensive knowledge exploration and expropriation endeavors of others, protocols have come to offer themselves as practical strategies that protect and respect local knowledge resources, whilst simultaneously addressing the social and cultural frameworks that enabled the exploitation of these resources without appropriate acknowledgement, consent or respect to begin with. Protocols offer the capacity for both renegotiating unequal knowledge-sharing practices, as well as establishing new relationships between custodians of valuable cultural resources and the multiple external users of these same resources.

What are protocols?

Protocol derives from the Greek *protokollen* meaning ‘table of contents’ or ‘first sheet’ and it implies the initial stage of guidance and instruction offered when encountering something new. In our contemporary moment, protocols can be broadly understood as context driven policy. They provide guidance and instruction when dealing with new issues involving Indigenous rights to derive benefits from knowledge that has been actively developed and nurtured within Indigenous contexts. Protocols are especially helpful for mediating the differing expectations and value systems between industry, research and Indigenous communities. In some instances, protocols can resemble memorandums of understanding,

but they can be much more expansive in addressing specific issues regarding consent, benefit sharing, relevant laws and community knowledge management practice. Because of what protocols can incorporate they are becoming the primary means for facilitating the development of future relationships between parties that have historically not substantively recognized, acknowledged or engaged each other.

Protocols function as a means for changing people's understanding of an issue, and thus, how they act in relation to it. In the context of the sharing, usage and storage of indigenous knowledge, protocols are being utilized as a strategic way of increasing reflective behavior around Indigenous rights in cultural knowledge and resource use. One clear advantage of protocols is that they can be flexible and adaptable to specific contexts and local interests. This makes them ideal tools for guidance on appropriate and/or ethical behavior and practice. In the absence of formal legal intellectual property mechanisms for recognizing and protecting rights in indigenous cultural knowledge, and in ever increasing contexts where relationships with Indigenous peoples are sought, or where Indigenous knowledge is used, protocols are providing a productive tool for negotiating new kinds of equitable relationships.

Why use protocols?

The possibility of using protocols in this context emerged out of the problems that Indigenous and local communities have with intellectual property law. In short, intellectual property and copyright and patents in particular, demands that Indigenous knowledge and Indigenous people are identified and categorized in ways that do not necessarily reflect Indigenous laws, epistemologies, ontologies, systems of governance or personhoods. Protocols allow for marginalized and disenfranchised parties to participate and engage in decision-making processes, and to be treated with respect and valued as holders and custodians of cultural knowledge. The development of protocols reflects a critical attention to the initial conditions of incorporating and utilizing indigenous knowledge, as well as how these old practices can be re-interrogated and more appropriately aligned to include Indigenous people as leaders and as active collaborators with legitimate perspectives.

Who develops protocols?

There are two main kinds of protocols: Sector Protocols and Collaborative Protocols. Sector Protocols are those that are developed by specific groups that share interests. Examples of groups that make Sector Protocols are university and other privately funded researchers, cultural institutions like museums and libraries, and specific industry groups like the film industry or the pharmaceutical industry. What these protocols share is that they are designed to inform the behavior of the relevant sector *in relation to* their engagement with Indigenous peoples and communities. These protocols recognize power inequalities and the lack of formal legislative options that might otherwise protect parties from unscrupulous behavior. They help to set new terms of engagement that are ethical and respectful to the different needs of Indigenous peoples. They also establish working frameworks and set new standards for practice.

Collaborative Protocols are those developed between parties and that address a specific issue or practice. Collaborative Protocols are targeted to a particular instance - for example the collection of plant samples within a specific context that has resident Indigenous or local peoples - and therefore often also incorporates local needs about the nature of the research and any future expectations about how knowledge from the community can be shared and acknowledged. They are more detailed because of the particularities of the issue and the needs of the various stakeholders. Collaborative Protocols are productive frameworks for developing new relationships between parties as they inevitably have to deal with the unequal knowledge sharing practices of the past. Collaborative Protocols tend to include more formal legal options including contracts and agreements and address issues around informed consent and benefit sharing.

Protocols, Policy and Formal Law

While intellectual property law has been slow to develop new frameworks that can incorporate Indigenous needs and expectations around knowledge use, access and control, questions about what practical alternatives exist for protecting indigenous knowledge use, that are not dependent upon a specific legislative remedy, have emerged. It is in this context, and in responding to a lack within current national and international legislation and

intellectual property norms, that the possibility of protocols have been raised, developed and utilized. Protocols work to inform and change practice, and to address the exclusion of Indigenous interests within current legal frameworks. As context driven policy they can address particular issues and problems that formal law cannot or is not appropriate. They can be made more binding if needed but they start from a position of good faith, ethical practice and equitable relations.

Protocols are a practical adjunct to formal law making processes. The shift to protocols is itself illustrative of current trends in intellectual property towards private law making, for example through agreements and consents. In the next few years we can expect many of the principles that are developed through protocols to inform international law making as well as national policy initiatives. This is because protocols are a vehicle for norm making. This is particularly important in an area that has historically been characterized by exploitative practice.

Protocols are international in scope and reflect the diverse geopolitical dimensions of Indigenous interests in knowledge control and access. They are flexible to different cultural contexts and can accommodate different expectations about the uses of knowledge. They provide an opportunity for developing new and productive ethical relationships.

So to end : Some last questions

Clearly working out what the purpose of the recording is will greatly help in your engagement with source communities and will be invaluable for helping those who follow us know what the intentions were.

Each motivation results in a different kind of recording – especially what kind of information is included and what is not. Always remember that documentation is a FORM of knowledge. It is not the only way knowledge exists and documentation can never capture everything. It can't capture the nuances of gestures of the significance of

relationships that keep the knowledge alive. But it can be a very helpful tool for protecting interests that for too long have been marginalized.

Thank-you for your time and the invitation to speak with you today.

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