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**Cultural Heritage Archives and Databases, Intellectual Property and the Protection  
of Traditional Cultural Expressions**

by

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**Introduction**

Indigenous peoples and other traditional communities have long argued that their traditions, knowledge systems and cultures are under threat from a variety of sources, such as new technologies and the globalization of culture and commerce.

It is also argued by some that their traditional knowledge systems and cultural expressions are not adequately protected by or against current intellectual property (IP) laws.

In particular, they refer *inter alia* to the

- (i) unauthorized adaptation, reproduction and subsequent commercialization of traditional cultural expressions, with no sharing of economic benefits;
- (ii) use of traditional cultural expressions in ways that are insulting, degrading and/or culturally offensive;
- (iii) appropriation of the reputation or distinctive character of traditional cultural expressions in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and 'style'; and,
- (iv) failure to acknowledge the source of a tradition-based creation or innovation.

In this regard, the World Intellectual Property Organization (WIPO) is engaged in a program of work examining the interfaces and relationships between IP laws and the protection of Indigenous and traditional forms of creativity and innovation.

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One issue that WIPO's work has begun to explore more recently is the relationship between the protection of Indigenous and traditional forms of creativity and innovation, on the one hand, and the management of rights in cultural heritage archives, databases, registers and other such collections, on the other. This issue has arisen because some Indigenous and traditional community representatives have suggested that their rights and interests, including those under customary and Indigenous laws, are not always safeguarded when their traditional cultural expressions are first recorded and documented by folklorists and other fieldworkers and/or when they are subsequently displayed and made available to the public by museums, archives or through databases.

This paper will examine this issue further. As this is a relatively new issue, the paper does not seek to provide definitive answers, but rather to raise the issue and questions related to it for discussion. The comments and suggestions of members of the International Association of Sound and Audiovisual Archives (IASA) would be most welcome, and would be incorporated into future versions of this paper.

Before discussing this issue, however, the paper first provides some brief background information.

### **Describing 'traditional cultural expressions'**

The term 'traditional cultural expressions' (or, 'expressions of folklore'), and other terms referring to more or less the same subject matter such as 'indigenous culture and intellectual property' and 'intangible and tangible cultural heritage', potentially cover an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, processes of production and spaces that originate in many communities throughout the world.

The terms 'traditional cultural expressions' and 'expressions of folklore' are used synonymously in this paper. 'Traditional cultural expressions' (or TCEs) is used as a neutral working term because some communities have expressed reservations about the negative connotations of the word 'folklore.'

TCEs may be either intangible, tangible or, most usually, a combination of the two. For example, the Mardi Gras 'Indians' of New Orleans exhibit a true example of tangible (costumes, instruments, floats) and intangible (music, song, dance, chant) elements of traditional culture that cannot be separated. In some cases, TCEs may be associated with technical know-how such as medicinal knowledge (referred to as 'traditional knowledge' in WIPO's work program), but this is not always the case. This paper does not directly address technical traditional knowledge. Of interest, however, may be that there is ongoing extensive work being undertaken at national and regional levels on the documentation and publication of traditional knowledge as part of 'prior art' as a defensive strategy to avoid its patentability.<sup>2</sup>

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<sup>2</sup> See WIPO document WIPO/GRTKF/IC/5/6, for example).

For present purposes, TCEs could be described broadly as productions consisting of characteristic elements of traditional cultural heritage developed and maintained by a community, including verbal expressions, such as stories, poetry, signs, symbols and indications; musical expressions, such as songs and music; expressions by actions, such as dances, plays and rituals; and, tangible expressions, such as paintings, carvings, sculptures, pottery, mosaic, jewelry, basket weaving, textiles, carpets, handicrafts, musical instruments and architectural forms.

### **WIPO and its work on TCEs**

WIPO is a specialized agency within the United Nations system. The Convention Establishing the World Intellectual Property Organization, 1967 provides that WIPO's primary objective is 'to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization.'<sup>3</sup> The Convention's preamble records that the promotion of intellectual property protection is desirable 'in order to encourage creative activity'.

WIPO's work on TCEs began several decades ago, leading *inter alia* to an amendment to the Berne Convention for the Protection of Literary and Artistic Works in 1967 which provides a mechanism for the international protection of unpublished and anonymous works (including TCEs fitting this description) and, in 1982, to Model Provisions for national laws, developed jointly by WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

More recently, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Committee) was established in 2000 to facilitate Member State discussions of these three themes.

Specifically as regards TCEs, the Committee is making significant progress in articulating, in intellectual property terms, the needs and expectations of Indigenous peoples and traditional communities in relation to their TCEs, marking out a conceptual framework within which to view those needs and expectations, and developing policy options and practical tools in response to them.

The Committee has considered detailed Secretariat analysis of the use of existing intellectual property and *sui generis* approaches for the legal protection of TCEs. This analysis was based on the national experiences of 64 Member States, surveyed through a questionnaire issued by WIPO in 2001 and presentations made during Committee sessions, and a set of case studies. One of these, entitled 'Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions', comprises

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<sup>3</sup> Article 3(i).

practical studies of actual cases in which Indigenous Australians have sought to use intellectual property to protect their TCEs. In addition, WIPO has also published a study of practical experiences in India, Indonesia, and the Philippines. The Committee has received detailed briefings by New Zealand, Nigeria, Panama, the Russian Federation, Tunisia, the United States of America and the Secretariat of the Pacific Community on their recent legislative experiences with the legal protection of TCEs.<sup>4</sup>

As mandated by the Committee, WIPO is currently working on publication of a ‘Practical Guide’ on the IP protection of TCEs. It is intended that this publication be a useful guide to policy makers, legislators, Indigenous and local communities, cultural heritage archives and institutions, and other stakeholders wishing to establish and implement effective systems for TCE protection. A practical study of the implications of recognizing and implementing Indigenous and customary laws and protocols in TCE protection systems is also being worked on.

### **A policy framework**

The relationship between TCEs and IP raises complex and challenging issues. The key challenge, perhaps, is to balance the need to preserve traditional cultures with the desire to stimulate tradition-based creativity and innovation as a contribution to sustainable economic development. Addressing this challenge provokes some deeper questions. To whom, if anyone, does a nation’s cultural heritage ‘belong’? What is the relationship between IP protection and the promotion of cultural diversity? Which IP policies best serve a creative and multicultural ‘public domain’? How, if at all, should current IP systems recognize customary laws and protocols? When is ‘borrowing’ from a traditional culture legitimate inspiration and when it is inappropriate copying? What is the relationship between the ‘preservation’ of cultural heritage and the IP ‘protection’ of TCEs?

### **Key concepts**

#### *‘Protection’ and ‘preservation/safeguarding’*

It is useful to clarify the distinct notions of ‘intellectual property protection’ and ‘preservation/safeguarding’ when applied to cultural heritage. The term ‘protection’ is widely used, but this can mask a wide range of potential objectives. In some cases, it appears that the needs of Indigenous and traditional communities are perhaps more concerned with preservation and safeguarding than protection in the IP sense, which refers, in short, to enforceable property rights in intangible creations and innovations in order to control their commercialization.

However, while ‘intellectual property protection’ and ‘preservation/safeguarding’ are

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<sup>4</sup> All documents and materials are available at <http://www.wipo.int/globalissues/cultural/index.html>

distinct notions, there is a relationship between them which requires greater understanding, balance and coordination.

### *'Traditional'*

While the cultural heritage of a community or nation lies at the heart of its identity and links its past with its present and future, cultural heritage is also 'living'. As the Japanese industrial designer Sori Yanagi has said, incorporating the element of traditional folk craft into modern design can be more valuable than imitating folk craft itself.

While it is often thought, therefore, that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework. Thus, the term 'traditional' does not mean 'old' but rather that the cultural expressions derive from or are based upon tradition, identify or are associated with an indigenous or traditional people and may be made or practiced in traditional ways.

From an IP perspective, a contemporary literary and artistic production based upon, derived from or inspired by traditional culture that incorporates new elements or expression is a 'new' work which is generally protected by existing copyright. For example, the Australian case *Milpururru v Indofurn Pty Ltd (1995) 30 IPR 209* involved carpets which reproduced (without permission) either all or parts of well-known works, based on traditional creation stories, made by Indigenous artists. The artists successfully claimed infringement of copyright. Similarly, a new design, although tradition-based, can receive industrial design protection. For example, a designer from the Yunnan Province, China has received industrial design protection for his tradition-based silver-plated tea-set.

The law makes, however, no distinction based on 'authenticity' or the identity of the author. The originality requirement of copyright would be met by an author who is not a member of the relevant community in which the tradition originated or has been preserved. Ironically, the greater the borrowing and adaptation (or 'distortion', depending on one's perspective) made to the TCE, the greater the chances that the derivative product will emerge as a 'new' IP-protected creation! This is the root of the complaint by communities who wish to prevent or control the use of their cultures as sources for 'new' creations by third parties operating outside the traditional or customary context. However, not only third parties can benefit. Indigenous and traditional communities and individuals can also receive IP protection for their tradition-based creations and innovations as a contribution to their economic development. This, it can be argued, is how the IP system properly functions – not to reward the mere preservation of the past, but rather to revitalize it and incentivize tradition-based creativity for economic growth.

### *The 'public domain'*

The appropriate role, contours and boundaries of the 'public domain' is also integral to developing an appropriate conceptual framework for the protection of TCEs. While

contemporary tradition-based creativity appears more or less protected by conventional IP laws, pre-existing cultural heritage *per se*, and mere imitations and recreations of it, are regarded by the IP system as ‘public domain.’ Some argue that the public domain character of pre-existing cultural heritage does not hamper its development - to the contrary, copyright encourages members of a community to keep alive pre-existing cultural heritage by providing individuals of the community with copyright protection when they use various expressions of it in their present-day creations or works. A robust public domain allows too for the kind of cultural flows and exchanges that have forever marked music and other cultural forms. Musical traditions such as jazz emerged in the early twentieth century in cultural crossroads such as New Orleans, combining elements of African American, Afro-Caribbean and European cultures. Rock music evolved from blues, valuing or rewarding imitation, revision and improvisation. So too, cultural expressions and practices from ‘dominant cultures’ continue to be absorbed and popularized in less dominant cultures. Is it intended to control or demand compensation in all these cases?

Indigenous and other cultural communities, however, forcefully challenge the ‘public domain’ status of traditional cultures under IP law. They argue that the ‘public domain’ is purely a construct of the IP system and that it does not take into account private domains established by Indigenous and customary legal systems. Their TCEs were never protected and are thus not part of a ‘public domain’, they argue. In fact, under Indigenous and customary laws, there is no ‘public domain’ in the IP sense. Furthermore, they question whether the ‘public domain’ status of cultural heritage, as seen through the eyes of the IP system, offers the greatest opportunities for creation and development. Should all historic materials be denied protection simply because they are not recent enough? Providing IP protection for only contemporary tradition-based creations is an inappropriate ‘survival of the fittest’ approach that does not best serve cultural diversity and cultural preservation, it is argued. Almost everything created has cultural and historic antecedents, and systems should be established that yield benefits to cultural communities from all creations and innovations that draw upon tradition.

### **IP needs and expectations of Indigenous and traditional communities**

In the course of the extensive fact-finding and consultations undertaken by WIPO, Indigenous peoples and traditional communities have expressed various IP-related needs, such as:

(a) *IP protection to support economic development:* some communities wish to claim and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development.

(b) *IP protection to prevent unwanted use by others:* some communities may wish to claim IP in order to be able to actively exercise IP rights that prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally

offensive or demeaning use. Uses which may wish to be prevented could include for example: (i) uses that falsely suggest a connection with a community; (ii) derogatory, libelous, defamatory or fallacious uses; (iii) uses of sacred and secret TCEs.

(c) *Prevention of others acquiring IP rights over TCEs:* communities are also concerned to prevent others from gaining or maintaining IP over derivations and adaptations of TCEs and representations. This entails the use of defensive mechanisms to block or pre-empt third parties' IP rights that are considered prejudicial to the community's interests, and to the integrity of their cultural heritage and cultural expressions. This kind of strategy is distinct from positive IP protection, in which a community actively obtains and exercises IP rights ((a) and (b) above). Both defensive and positive protection strategies may be used in parallel by the one community, depending on their assessment of their overall objectives and interests. Specific defensive protection mechanisms may also be built into national or regional IP laws: for instance, specific measures to prevent the acquisition of trademark rights over indigenous or traditional symbols have been already adopted by New Zealand, the United States of America and the Andean Community.

Generally speaking, one single form of protection for TCEs is unlikely to meet all the needs of a traditional community: it may need to use a range of positive and defensive legal tools to achieve its chosen objectives in protecting and preserving its traditional culture.

### **Trends and experiences at local, national and regional levels**

One of the tangible deliverables of the WIPO Committee's work so far has been the gathering, analysis and publication of extensive information on actual community, national and regional experiences (see above for references). These evidence a wide diversity of approaches to the legal protection of TCEs. For example, several States already provide specific legal protection for TCEs principally within copyright legislation. In most of these cases, the provisions are based, to differing degrees, upon the Model Provisions, 1982. However, it appears that there are few countries in which such provisions are actively utilized. In this respect, the IGC has endorsed enhanced legal-technical cooperation for the strengthening and more effective implementation of national systems. Many States have also suggested that it would be desirable to provide States and regional organizations with updated and improved guidelines or model provisions for national laws.

A few States have established stand-alone *sui generis* (meaning 'unique' or 'of its own kind') systems, such as Panama and the Philippines. For example, Panama's Law, the "Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity as their Traditional Knowledge" of 2000, provides perpetual and collective IP-type protection, based upon registration, for the handicrafts and other creations of its Indigenous peoples. The Bangui Agreement of the African Intellectual Property Organization (OAPI), as revised in 1999, also establishes

*sui generis* protection for TCEs. More recently, the Secretariat of the Pacific Community has developed a *sui generis* model law for Pacific Island countries.

However, there are other States who argue that no specific protection for TCEs is necessary or desirable. They argue that existing and conventional IP systems are adequate, if their full potential is explored. Members of cultural communities as well as others are free to create and innovate on the basis of their cultural traditions, and acquire and benefit from any IP that may subsist in the creations and innovations (as the copyright and industrial designs examples above show). Interestingly, quite a number of countries from all regions regard folklore as part of the ‘public domain’ (as discussed above). For example, the copyright law of one country expressly considers ‘folklore works and traditions of unknown authors’ to be in the public domain. Another article of the same law states: ‘Indigenous art in all its forms, including dances, songs, handicraft, designs and sculptures, shall belong to the cultural heritage.’

It should be noted, however, that not only copyright and industrial designs are relevant to TCEs. Australia, Canada, New Zealand and Portugal have provided examples of the use of trademarks, particularly certification marks, to ensure the authenticity and quality of Indigenous arts and crafts. Unfair competition is another part of the IP system that could be useful, particularly to combat false and misleading indications as to the “authenticity” of certain creations, notably arts and crafts. And, the WIPO Performances and Phonograms Treaty, 1996 provides international protection for the performers of ‘expressions of folklore.’

Some of these States consider that some adaptations to existing rights and/or some special measures within the IP system may be necessary to meet specific needs – for instance, copyright protection for collective works or works that have not been fixed (e.g. works that have been passed only in oral form) and special remedies for copyright infringement that is also culturally offensive. In the trademark area, the United States of America has, for example, established a database that may be searched to prevent the registration of a mark confusingly similar to an official insignia of a federally or state-recognized Native American tribe. In New Zealand, a recent amendment to the Trade Marks Act allows the Commissioner of Trade Marks to refuse to register a trademark where its use or registration would be likely to offend a significant section of the community, including Maori.

### **Cultural heritage archives, databases, recordings and other collections**

As already pointed out, Indigenous peoples and local communities argue that their IP-related rights and interests, including those under customary and indigenous laws, are not always safeguarded when their TCEs are first recorded and documented by folklorists and other fieldworkers and/or when they are subsequently displayed and made available to the public by museums, archives and other collections. Indigenous peoples and local communities have pointed out that IP rights in the recordings and documentation of their TCEs often do not vest in them, and that unregulated public access to these recordings,

which may include sacred and secret materials, facilitates inappropriate public disclosure and the making of unauthorized and inappropriate derivative works in which they do not hold IP. These concerns have sharpened in recent years in the face of the growing trend of museums to digitize their collections and make them publicly accessible on the Internet for both museological/curatorial and commercial purposes. To illustrate their concerns, Indigenous peoples and local communities point to cases in which published ethnomusicological collections were used as the source for commercially successful ‘world music’ albums.<sup>5</sup>

### *An example*

Let’s take a practical example to illustrate and examine this concern. Imagine a case in which a fieldworker makes an audio-visual recording of the performance of an old folk song with the consent of the performer, who is a member of the cultural community from which the song originated. The fieldworker deposits the recording in an archive or other cultural heritage collection. Subsequently, a commercial composer accesses the collection, makes a copy of the recording and, at some later date, records a successful hit that borrows from the old folk song. The hit is sufficiently ‘original’ to enjoy copyright protection, as discussed earlier. No mention is made of the source community or performer, who, needless to say, also receive no share in the commercial success of the hit. Could IP rights be used to advance the rights and interests of the performer and his or her community?

There are potentially four distinct IP rights that could be relied upon by the performer and/or the community: copyright in the music; copyright in the lyrics; related rights in the performance of the song; and, copyright in the audio-visual recording made by the fieldworker.<sup>6</sup>

There is probably no copyright in the song or the lyrics, because, as discussed earlier, they are old, not fixed and anonymous, and do not meet the requirements for copyright (they are in the so-called ‘public domain’). As for the related rights of the performer in his or her performance, performances of ‘expressions of folklore’ are now protected as performances (this is so under the new WIPO Performances and Phonograms Treaty, 1996, which came into force on May 20, 2002). Assuming therefore that the country of which the performer is a national has ratified and implemented the WPPT in its national law, the performance is a protected one. However, performer’s rights do not at present extend to audio-visual performances, only to the audio (sound) aspects thereof. This is

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<sup>5</sup> For example, the “Deep Forest” CD produced in 1992, fused digital samples of music from Ghana, the Solomon Islands and African ‘pygmy’ communities with ‘techno-house’ dance rhythms; “Boehme” was produced in 1995, similarly fusing music from Eastern Europe, Mongolia, East Asia and Native Americans; rights to the well-known “The Lion Sleeps Tonight” – based upon the 1930s composition “Mbube” by the late South African composer Solomon Linda - continues to be disputed in a complex matter. See also *Protection of Indigenous Dance Performances* “Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions” available at: <http://www.wipo.int/globalissues/studies/cultural/minding-culture/studies/performances.pdf>.

<sup>6</sup> In some jurisdictions, the rights may be related rights and not copyright.

because the most relevant treaties (the TRIPS Agreement and the WPPT) cover only fixations of performances on *sound* recordings. In addition, the rights of performers are limited in that once a performer has consented to the fixation of his performance, it seems that he loses the right to prevent the making of copies of the fixation.<sup>7</sup> It follows that the performer would not be entitled to prevent the copying of the recording or parts of it. So far, the performer's and the community's position seems rather bleak.

However, the copyright in the recording made by the fieldworker (assuming for the present that the recording was sufficiently 'original' for copyright purposes) is potentially useful and if managed and exercised strategically could offer opportunities for protecting the performer and the community. The rights in the recording would vest either in the fieldworker who made the recording, or in the institution that employed him, depending on his employment contract and national laws, or in the institution where he deposited the recording, depending on the terms of the deposit agreement (if any).

These rights include the right to prevent or authorize the copying, adaptation and public communication of the recording. Therefore, this right could be used to ensure that any such uses of the recording take into account the rights and interests of the performer and the relevant community. For example, and this is already common practice in many public archives and museums, it may be stipulated that copies of recordings be released only upon evidence that the consent of the performers and/or the relevant community has been obtained, or there have been good faith efforts to locate their heirs. Similar stipulations might seek to regulate future uses of the recording in accordance with Indigenous and customary laws, ensure equitable benefit-sharing, secure appropriate forms of acknowledgement, and so on.

This is a brief and simplistic example, but perhaps it is useful in illustrating the kinds of IP issues that can arise and how these may cause concern for some Indigenous and traditional communities. The more precise operation of IP laws in cases such as this depend, of course, upon various factors, such as national and regional laws, relevant contracts, and related policies and practices.

### *Discussion*

The field recording assumes a central importance, therefore, because it may be the only recording of the song and the performance that is available and accessible by commercial and other users. Audio-visual archives, museums and other such collections, which play a valuable educational role, and are essential for the preservation, conservation, maintenance and transmission of tangible and intangible forms of cultural heritage, thus lie at a critical juncture between communities and the market-place, and perhaps the strategic management of their IP can advance the rights and interests of the original providers and custodians of TCEs making up their collections. These IP rights could be used in ways too that recognize Indigenous and customary laws and protocols, a long-

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<sup>7</sup> See Article 7.1.(c).(i), Rome Convention, and Article 14.1, TRIPS Agreement.

standing demand of Indigenous peoples and local communities.

Overly-strict protection is not desirable, however. Cultural heritage and traditions can and perhaps should act as sources of inspiration and forward-looking creativity. In the example above, the composer is in a sense ensuring the onward transmission of the traditional song and perhaps securing its survival (as Chaudhuri has remarked, the recording, broadcasting and tourism industries have become the ‘new patrons of oral traditions and folklore’.<sup>8</sup> The key is distinguishing between legitimate inspiration and undesirable misappropriation.

This brief example demonstrates in a practical way tensions that can arise between preservation and protection, as discussed earlier, because the very process of preservation can trigger concerns about lack of protection and can run the risk of unintentionally placing TCEs in the public domain or inadvertently giving third parties unrestricted capacity to use TCEs against the originating community’s own values and interests, particularly those in respect of sacred and secret materials. This occurs most obviously when preservation is undertaken without the authorization of the traditional owner or custodian, for example the unauthorized recording of performances of expressions of folklore. But this tension also arises when the process of preservation is undertaken with the consent or involvement of the TCE custodian, but unwittingly or incidentally undermines IP protection of the TCE - this can occur when material is recorded or documented without full understanding of the IP implications.

The relationship between preservation in the form of recordings and databases and protection is also a positive one. Recording and fixing TCEs in a material form (such as in an audiovisual recording) may be the only effective way of establishing IP in intangible, oral forms of TCEs which would otherwise be in the public domain. However, in whom do those IP rights vest? Is the documentation and recording of TCEs an appropriate IP strategy for either establishing rights in ‘public domain’ TCEs and/or for preventing others from acquiring IP over TCEs and works derived therefrom (as part of a defensive protection strategy, as was described above)?

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<sup>8</sup> Chaudhuri, S., “The Experience of Asia,” paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002, page 34.

*Possible practical tools and other avenues*

There are several practical tools that could address these and other such IP issues in relation to recordings and databases of TCEs. These tools could include:

- (a) the development of IP-related *protocols, codes of conduct and guidelines* for use by folklorists, museums and archives;
- (b) the development of an IP *check list* and *model IP contractual clauses* for use in elaborating deposit, access, release and license agreements used by folklorists, museums and archives;
- (c) regarding specifically digitized cultural heritage, the development of model IP-related “*Rules of Use*” and “*Copyright Notices*” for use in connection with websites, CD-ROMs, specialized databases and other electronic multimedia products.

Two additional avenues worth exploring further are the use of software and digital rights management tools, and taking advantage of the IP protection of collections and databases.

Member States of WIPO have expressed support for WIPO exploring these options and issues further, working closely with relevant institutions, associations and centers, inter-governmental organizations, non-governmental organizations and other experts.

*Protocols, codes of conduct and guidelines*

Anthropologists, folklorists, ethnomusicologists and others have discussed this issue at length,<sup>9</sup> and there are already several policies, ethical codes, protocols and guidelines developed by folklore, ethnographic and anthropological societies and other professional bodies, although it may be said that few appear to deal directly or in detail with IP questions.

In developing IP-related protocols, codes of conduct and/or guidelines, some existing examples of protocols and codes of conduct could be used as a starting point:

- (i) the Australian National Association for the Visual Art’s (NAVA) report *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector*. The report has raised public awareness and encouraged discussion of Indigenous cultural and IP issues. The report details protocols for dealing with material created by Indigenous people and with material containing imagery, motifs

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<sup>9</sup> See proceedings of the Folk Heritage Collections in Crisis Conference, organized by the American Folklore Society and the American Folklife Centre at the Library of Congress in December 2000; Chaudhuri, S., *op.cit.*; Peters, M., “Protection of the collection of expressions of folklore; the role of libraries and archives,” paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002; Seeger, A., “Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property,” 1996 Yearbook for Traditional Music, p. 87; Toelken, Barre “The Yellowman Tapes, 1996-1997,” Journal of American Folklore 111 (442) 381-391, 1998.

or styles which are identifiably Indigenous. These codes are not legally enforceable, but they do establish industry standards that may, over time, be pointed to as a standard of conduct setting the course for legal rights;<sup>10</sup>

- (ii) the Statement of Ethics of the American Folklore Society;
- (iii) the Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services;
- (iv) the Code of Practice of the Australian Arts Council for the Australian Visual Arts and Craft Sector;
- (v) the Research Policy of the Working Group of Indigenous Minorities of Southern Africa (WIMSA);
- (vi) from Canada, the Inuit Tapiriit Kanatami Guidelines for Responsible Research, the Dene Cultural Institute Guidelines and the Traditional Knowledge Research Guidelines: A Guide for Researchers in the Yukon, prepared by the Council of Yukon First Nations;
- (vii) previous Possessions, New Obligations (Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples).

Certain archives and institutions address these questions in their day to day activities. For example, Chaudhuri reports on efforts at the Archives and Research Centre for Ethnomusicology, American Institute for Indian Studies in India, to protect the rights of performers by limiting the rights of the depositors of field recordings and by contacting the performers of deposited recordings to explain their rights.<sup>11</sup> The American Folklife Center, of the Library of Congress, follows a similar approach, viewing the collector/donor as well as the archive as being in a curatorial position only, and committed to fulfilling the wishes of the original performer of the tradition:

“In other words, only the performer and his/her community or heirs are the rights-holders to the material; the collector/donor and the repository are curators, who are bound by the agreements reached among the parties. Where there are no written agreements, the researchers (sometimes with the help of the repository) must make a good faith effort to contact the original performer(s) to obtain written permission to re-use the material. This is especially in the case of where money may be made in a commercial recording. If that good faith effort fails, the researcher may still contact the collector/donor, who may have an opinion as the intermediary as to the wishes of the performer or the performer’s community. Thus, there is a four-way dialogue among the performer, the collector/donor, the repository, and the researcher, where each has a role: The performer is the rights-holder, the collector/donor is the intermediate curator, the repository is the final curator, and the researcher is the applicant for permission to use the material.”<sup>12</sup>

At the Oman Centre of Traditional Music, experts at the center regard the development of

<sup>10</sup> See Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, page 139.

<sup>11</sup> Chaudhuri, *op. cit.*, page 36.

<sup>12</sup> Personal communication with Ms. Peggy Bulger, Director and Mr. Michael Taft, Folklife Specialist, American Folklife Center, October 15, 2002.

new ways of promoting the musical heritage in Oman without the consent of the traditional performer as a violation of the customary understanding of heritage use, they do not believe that exclusive rights should be granted in the reproduction of traditional music. Nevertheless, they do welcome the grant of performers' rights to the performers of traditional Omani music.<sup>13</sup>

*A check list and model IP contractual clauses*

Closely linked to the development of protocols, codes of conduct and/or guidelines, would be the development of IP tools to use in elaborating deposit, access, release and license agreements used by ethnomusicologists and other fieldworkers, archives, museums, libraries and other institutions. These tools could include a check list of key issues that should be considered and model IP-related clauses for such agreements. Member States of WIPO have expressed support for work in this area.

Several examples exist of license and other agreements that could be used as a basis for such work. For example, the Australian Arts Law Center and the Working Group on Indigenous Minorities of Southern Africa (WIMSA) have developed model agreements and The Center for Folklife and Cultural Heritage of the Smithsonian Institution in the United States of America has extensive archives and collections of original sound recordings, drawings, posters, business records, correspondence, audiovisual recordings and photographic material. As a part of the Center, Smithsonian Folkway Recordings holds extensive collections of American Indian, bluegrass, blues, children's, and classical music as well as other genres. It licenses its music collection for non-profit or commercial purposes and for this purpose has developed a 'Master Recording License Request Form.'<sup>14</sup>

*Digitized cultural heritage – “Rules of Use” and “Copyright Notices”*

Cultural heritage is a rich resource for feeding the communication networks of the information society with cultural content. Museum and other collections are increasingly being digitized and presented in a variety of electronic media, such as websites, CD-ROMs, and specialized databases. This is being done for museological/curatorial and commercial purposes, such as for making educational, scientific and commercial by-products.<sup>15</sup> The interaction of cultural heritage with the information society poses some complex challenges and questions, however, particularly in so far as 'public domain' TCEs are concerned.

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<sup>13</sup> Paper by Dr. Jaber Bin Marhoun Flaifil Al Wahaiby, Director General, International Organizations Department, Ministry of Commerce and Industry, Oman, delivered at WIPO International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge, Bulgaria, May 29 to 31, 2001.

<sup>14</sup> See <<http://www.folkways.si.edu/licenserequests.htm>>. See also Seeger, A., "Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property," 1996 Yearbook for Traditional Music, p. 87.

<sup>15</sup> See Vinson, Isabelle, Museum International, 215, September 2002, pages 4 to 7.

Regarding digitized cultural heritage specifically in relation to TCEs, the development of model IP-related '*Rules of Use*' and notices (such as '*Copyright Notices*' for copyright works) for use in connection with websites, CD-ROMS, specialized databases and other electronic multimedia products could be useful. Useful here would be the experiences of the Canadian Heritage Information Network (CHIN) and the Arts Law Center of Australia, amongst others.

#### *Software and digital rights management tools*

Much work is being done on using software and digital rights management tools for the management of rights and interests in digitized collections of TCEs. These may offer useful avenues for protection of a technological nature and are worthy of further consideration. An example is work being undertaken by the Indigenous Collections Management Project, a collaborative project of the Distributed Systems Technology Center in Australia and the Smithsonian Institute's National Museum of the American Indian (NMAI) Cultural Resources Centre. While recognizing the potential benefits that digital technologies can offer with regard to the preservation and documentation of their histories and cultures, indigenous communities understand the opportunities for misuse and misappropriation of their knowledge which may accompany digitization. Software tools have been designed to enable indigenous communities to protect unique cultural knowledge and materials which have been preserved through digitization. The software tools described here enable authorized members of communities to: define and control the rights, accessibility and reuse of their digital resources; uphold traditional laws pertaining to secret/sacred knowledge or objects; prevent the misuse of indigenous heritage in culturally inappropriate or insensitive ways; ensure proper attribution to the traditional owners; and, enable indigenous communities to describe their resources in their own words.<sup>16</sup>

#### *IP protection of databases and collections*

The legal protection afforded to collections, anthologies and databases may offer some protection for documented and recorded TCEs. For example, a database of fading Native American rock art is both preserving and protecting the art.

There are already many electronic databases of traditional cultural expressions throughout the world, such as a CD-ROM containing "Folk Performances of Thailand," published by the Office of the National Culture Commission of Thailand, and the "Cultural Stories" database being developed by the Tulalip Tribes of the United States of America. It is not, however, clear to what extent copyright and related rights issues may be relevant or have

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<sup>16</sup> Hunter, Jane; Koopman, Bevan; Sledge, Jane, "Software Tools for Indigenous Knowledge Management", September 2002. See also Hunter, Jane "Rights Markup Extensions for the Protection of Indigenous Knowledge", May 2002, and Wells, Kathryn, "A Model and Pilot Options for a Digital Image and Text Archive of Indigenous Arts and Knowledge; A Progress Report", 1997.

been considered in their development and dissemination.

It is often suggested that expressions of folklore may be protected indirectly either by copyright protection afforded to databases that are 'original' by reason of the selection or arrangement of their contents, or by proposed *sui generis* protection for non-original databases.

Database protection under copyright does not protect the contents of the database and is without prejudice to any rights subsisting in the contents. Therefore, the protection in question would not apply to the expressions of folklore in the database, but only to their publication and presentation in the form of a collection, anthology or compilation. There would be nothing, therefore, to prevent unauthorized copying of one of the songs making up a collection of traditional music and adapting and commercializing that song, assuming for the present that no other rights attach to the song.

However, the prospect of *sui generis* database protection may have application in this area. A European Community Directive and certain national laws now provide for protection of non-original databases. As an example, the European Community Directive provides for the makers of databases, which represent a substantial investment in either the obtaining, verification or presentation of the contents, the rights to prevent the extraction and/or re-utilization of the whole or of a substantial part of the database's contents. This protection applies irrespective of the eligibility of the contents for protection by copyright or by other rights.

Therefore, from the perspective of Indigenous peoples and traditional communities, it is possible that collections and databases of TCEs made by the relevant communities, whether or not the individual expressions are regarded as 'literary and artistic works', could be protected under proposals for *sui generis* database protection. However, whether this protection could, in principle, extend to individual expressions being extracted and re-utilized is doubtful.

However, in cases where the collection or other form of database is made by a person or persons other than the Indigenous or traditional persons or community that is the source of the expressions of folklore, it is that other person or persons who would own the rights in the database. In order for the relevant Indigenous peoples and traditional communities to hold the rights in such databases, they must be regarded as the creators or makers of the databases, or at least acquire the rights from the creators and makers. In this respect, the use of contracts to protect the rights of the TCE performers and or tradition-bearers could be explored further.

## **Conclusions**

As already stated, this is a relatively new issue, and this paper only poses several questions for discussion by experts in audio-visual archives, databases and other forms of collections. Comments and suggestions are most welcome. They will be incorporated in future versions of this paper, as well as inform future WIPO activities in this area, in particular the forthcoming WIPO 'Practical Guide' on the protection of TCEs.

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