

The Role of Intellectual Property in Safeguarding Intangible Cultural Heritage in Museums

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ABSTRACT

The current rate of cultural and technological globalisation has been recognised as an international threat to the cultural diversity of many nations. The insubstantial nature of intangible cultural heritage (ICH) has made it more vulnerable to the forces of globalisation than other aspects of cultural diversity and could lead to the disappearance of some forms of ICH. Museums have on several occasions committed themselves to the safeguarding of ICH as part of their institutional mandate. However, the integration of ICH into museum activities raises numerous intellectual property (IP) concerns in relation to the use and ownership of ICH resources. The present article first reviews the integration of ICH in museums as suggested by the 2012 *International Conference on Museums and ICH*. Second, it examines the related risks of misuse and incompatibility associated with ICH exposure in museums in the field of IP rights. Finally, the article suggests some effective IP mechanisms that could ensure that museums act ethically when dealing with ICH issues, and do respect ICH holders' rights.

Keywords

Intangible Cultural Heritage (ICH), UNESCO 2003 *Convention*, Seoul *International Conference on Museums and ICH*, safeguarding, Intellectual Property Law (IP), patents, copyright, collective marks, trademarks, Geographical Indications, unfair competition, TRIPS Agreement, TRIPS Article 39.

1. Introduction

Intangible cultural heritage (ICH) constitutes a fundamental form of cultural diversity. However, the pace of globalisation presents a threat to the fragile and insubstantial nature of ICH. Environmental hardships, added to the vulnerable social capacity of local

communities which are holders of ICH, work against the sustainability of ICH. Museums, by contrast, have a long history in the collection, conservation, research, and display of tangible works from the past, and could offer a similar service in the preservation of forms of ICH.

This article aims to retrace the outcome of the 2012 conference in Seoul in relation to the place of ICH in museums, and to underline the intellectual property (IP) related aspects of it. First, the article promotes the role of museums as mechanisms for safeguarding ICH. Second, it analyses the benefits afforded to ICH preservation by museums, as well as the risks related to its exposure. Third, it identifies the IP related aspects of such risks, and proposes some policies in the field of IP rights to address them.

2. Models of ICH preservation in museums

Integrating ICH in museums could be summarised in a single sentence: *Take the instruments out of their cases, and let them sing!*¹ However, such integration first requires an understanding of the very nature of ICH.

According to the UNESCO 2003 *Convention*, ICH is manifested in the following domains:²

- Oral traditions and expressions, including language
- Performing arts
- Social practices, rituals and festive events
- Knowledge and practices concerning nature and the universe
- Traditional craftsmanship

ICH is also a living memory, a narrative of the past, which can be made visible through the voices and narratives of races and nations.³ Living ICH is a valuable historical tool which can play an important role in re-animating museums and making sense of artefacts. However, it must be understood and used appropriately.

ICH in museums could be subject to multiple uses such as performances, recording, adaptation, interpretation, compilation, etc. Such creations and innovations of the human mind are granted protection under intellectual property, including copyright, related rights, databases, etc..

However this is unlikely to work for ICH for the following reasons:

- Most forms of IP are concerned with individual intent and rights, concepts which are often foreign to traditional communities.

- It is usually difficult to identify a specific source of ICH. The knowledge, innovations and practices of indigenous and local communities are often collectively held. The concept of ICH is also linked to knowledge as 'heritage' as opposed to knowledge as 'property', thereby reflecting its custodianship and inter-generational character.⁵ ICH affects the soul of a whole community, giving life to its history and promoting respect for the social identity, collective history and artistic expression of the particular community. The concept of 'intellectual property' contrasts with this holistic situation.
- IP laws refer to tangible concepts. ICH is not about rights, power, or creativity. The intellectual property's legal, novelistic approach contrasts with the sacredness and secrecy of ceremonies and ICH elements. ICH by its very nature is ancient and inherited, not 'created' as required by copyright standards of protection.⁶

3. Intellectual property law and ICH

To fill this legal gap, the World Intellectual Property Organization Intergovernmental Committee (WIPO IGC) has suggested, among other things, negotiating written agreements with indigenous communities and governmental authorities, and integrating the cultural identity of works into the traditional IP system.⁴ The cultures of traditional peoples have frequently been ignored when global standards on intellectual property were being set,⁷ making it difficult but not impossible to fit ICH into the conventional framework of intellectual property law (IP). One could suggest six forms of IP protection that might be used: copyright, patents, geographical indications, unfair competition legislation, trademarks, and Article 39 of the TRIPS Agreement which relates to secret knowledge.

3.1. Copyright

The fundamental problem with copyright in relation to ICH is the emphasis on private property rather than community identity, as the key to identifying an appropriate legality.⁸ ICH often belongs to communities rather than to an individual member of the community. The copyright regime which could protect ICH performances and traditional arts requires those responsible for their 'creation and authorship' to be identified. However, ICH performances and traditional

arts are inherited, transmitted from generation to generation, and adapted to fit new situations in the process. There is no identifiable author or creator. Also, while IP rights protect authors and creators from those who might seek to benefit financially from copying their works, communities manage ICH as a precious treasure inherited from ancestors, to be maintained, but not necessarily to be exploited for financial purposes.

Case study 1: safeguarding a Korean game (줄다리기) tug-of-war in Gijisi Juldarigi Museum, Korea (Dangjin Province, Gijisi District)

Tug of war (줄다리기)⁹ in Korea constitutes a social practice, a ritual and a festive event as described under article 2(c) of the UNESCO 2003 *Convention*. It is a ritual game associated with agricultural festivities and is part of the cultural heritage of the Dangjin people. It is connected with the spiritual aspects of harvest, peace and cultural identity. The folk game is currently safeguarded in the Gijisi Juldarigi museum through images and videos. Also, in the children's museum, *juldarigi* is taught to the next generation. Such methods constitute valuable safeguarding approaches, enabling the Dangjin community, and the Korean people as a whole, to continue the practice and transmission of this aspect of their intangible cultural heritage.

The folk game constitutes a production in the artistic domain, protected by the international copyright system under the Berne Convention.¹⁰ However,

tug of war (줄다리기) is an inherited community practice, with no sense of authorship. It would therefore be inappropriate to protect the practice itself the museum under copyright law. (Plate 1)

3.2. Patents

According to the Trade Related Aspects of Intellectual Property Agreement (TRIPS), novelty and the non-disclosure of a patentable invention are requirements for the grant of patents.¹¹ This could apply to certain sorts of ICH craft activities where there have been innovations in technique. However, as with copyright, the technique has to be the 'property' of an individual. Museums exhibiting ICH which could be the subject of a patent application of this sort need to be aware that exhibiting it will defeat any future patent application relating to it. This is because communication to the public of previously undisclosed knowledge will contravene the requirement that an invention be 'novel' when applying for protection under IP law.

Case study 2: fine ramie weaving 모시 (South Chungcheong Province, Hansan District)

Hansan 모시¹² fabric is woven in a specialised Ramie Cultural Centre surrounded by ramie fields. There are rooms where the whole process of weaving is described to the visiting public. The different processes include the collecting of ramie plants from surrounding areas, bleaching, tearing the plant into fine strings using the



Plate 1
A visit to Gijisi Juldarigi Museum in Korea reveals some extraordinary safeguarding methods, both digital and manual, for a folk game, a form of Tug-of-war. Photo: Gijisi Juldarigi Museum.



Plate 2
 Demonstration of fine ramie weaving, Hansan region in South Chungcheong Province.
 Photo: Seocheon County Hall.

lips and teeth, etc. The final fabric is characterised by its light weight and cool texture, making it ideal for wearing in hot summer weather. (Plate 2)

The promotion of the value and utility of Korean Hansan 모시, could possibly have implied the patentability of the process of making Hansan 모시 traditional clothing. However, the pre-disclosure of the craft techniques to the public through exhibition in the museum has defeated any future patent application.

Furthermore, article 27(1) of the TRIPS Agreement regulates the patentability of any invention, whether product or process, in all fields of technology, provided that they are, among other things, new and capable of industrial application. Our survey in the Korean South Chungcheong Province reveals that the weaving of Hansan 모시 is not 'new' in the terms of the TRIPS Agreement. Hansan 모시 goes back to 1960 as a form of sustainable livelihood for many households in the region. Additionally, ramie plants have to be ripped into fine strings using the lips and teeth. Such traditional techniques are far from being capable of industrial application according to patent law.

3.3 Geographical indications

Another possible IP protection for ICH could be 'geographical indications.' The use of geographical indications (GIs) could be an effective instrument for protecting ICH knowledge amongst practitioners and in

the countryside. The advantage of GIs in comparison with other intellectual property rights rests mainly on the fact that they are generally based on minimum levels of innovation.¹³ Also, GIs grant collective rights to all producers in a given geographic area who produces items of a particular type and quality. Protection is granted to a 'name' which remains attached to the specific community from which the knowledge emanates. GIs protect a product of which the quality, reputation, or other characteristics are essentially determined by its place of origin.¹⁴ Geographical indications and their protection therefore constitute a suitable means of protecting 'informal innovation,' particularly because the right is related to the product itself, and does not belong to a specific individual.¹⁵ The scope of protection granted is, however, limited to producers located in the region designated by the particular GI.¹⁶

Unfortunately, geographical indication protection under the TRIPS agreement is currently limited to protecting the production of wines and spirits;¹⁷ so it does not at present favour the protection of ICH, traditional knowledge or traditional cultural expressions. In addition, GI protection is restricted to the principles guarding against unfair competition.

3.4. Unfair competition

The gap left by the limitations of conventional IP systems to protect ICH might be filled by the rules governing unfair competition. Unfair competition

protection under IP law is based on the idea that it is unfair to benefit from the work of others. Under the *Paris Convention*, the unsanctioned use of a community's ICH could be defeated if an organisation sought to profit from it commercially.¹⁸ Also, it could be defeated under the rules of unfair competition if -

- there was an intention to create confusion
- false allegations were made in the course of trade of such a nature as to discredit the establishment,¹⁹ or the ICH itself.²⁰
- there were indications or allegations that there was something liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for purpose, or the quality of the goods involved.²¹

3.5. Article 39 of the TRIPS Agreement

This grants protection to undisclosed information, which could apply to the sort of ICH that communities would like to keep secret. ICH holders must, however, be able to prevent ICH information lawfully within their control from being disclosed to, acquired by, or used by others without their consent, in a manner contrary to honest commercial practices.²² The protection refers strictly to ICH that is kept secret,²³ is of commercial value,²⁴ and is subject to the proviso that the person lawfully in control of the information has taken reasonable steps to keep it secret.²⁵ The application of Article 39 is therefore quite limited.

3.6. Trademarks

The system of trademarks that designate the origin of a work and guard against its misappropriation could be used successfully to protect some examples of ICH displayed in museums.²⁶ By adopting a trademark standard, the consumer of community ICH-related works will be protected against the risk of confusion as to the origin of the goods, and from the unauthorised use of an identical or similar symbol in connection with identical or similar ICH works.²⁷ Collective marks constitute a suitable tool for the protection of ICH crafts such as the Hansan 모시 manufactured by officially recognised craftspeople.²⁸ Certification marks offer a suitable form of protection for ICH holders organised in communities and wanting to use the law to protect their intellectual property. Holders have to fulfill certain criteria in order to be entitled to use the certification mark. Labels of authenticity may be used to distinguish authentic ICH goods and services from other products on the market.

(Plate 3)

4. IP and museums

4.1. Museums, as cultural institutions, are IP users

Museums' use of ICH holders' IP rights are numerous – making reproductions, allowing the public access to ICH works, allowing online access to ICH collections, etc. As a consequence of this, museums have a duty to seek the approval of ICH holders prior to the use of any related material. Licensing ventures could be one way the



Plate 3
Certificate of authentication used by the collective of Fine Ramie Weavers of Hansan Region (모시). Photo: Seocheon County Hall.



Plate 4
Angklung Buhun played by the residents of Kanekes Village, Banten Province, Indonesia. Photo: Gaura Mancacaritadipura, 2009.

identified 'owner[s]' could give consent. If communities are the holders of the knowledge and expressions in question²⁹ they should be consulted prior to its use in any form, or its release to the public.³⁰

4.2. Museums as cultural institutions are IP owners

Museums create numerous works legally recognised as creations protected under copyright law. Such is the case with archive collections, ICH databases,³¹ communities' licensing agreements for ICH related business,³² and the management of ICH festivals or social events under IP areas such as trademarks, broadcasting licenses,³³ etc.

Various situations involving intellectual property issues could arise in the course of museums' management of communities' ICH material, including:

- The integration of local groups, individuals and community participation /involvement in the management of heritage related works.³⁴ This could raise the issue of paying custodians of local knowledge systems/performances when they perform in museums.
- The 'protection' of ICH in museums against unauthorised third party access and use. For example a user request to take down some material from the museum website may lead to the infringement of traditional holders' rights.
- The potentially offensive use of communities' sacred cultural signs by a museum.

- The publicising of rituals/artefacts/etc the community might see as secret or sacred.

Illustrative cases: publicising ICH v. secrecy

1. *Angklung Buhun* (traditional bamboo musical instrument) played by the Baduy people of Kanekes village in Banten Province, Indonesia. According to traditional laws, outsiders are forbidden to enter Kanekes village and one needs permission³⁵ to record their *Angklung Buhun* music and to interview the people outside their village.³⁶ (Plate 4)

2. Royal festivities and secrecy, Foumban, Cameroon. In Cameroon, the display of royal festive events is subject to strict rules of secrecy which the performers have to observe. The local museum and the event organisers regulate all recording, photography and video making.³⁷ (Plate 5)

Museums should decide in each case, to what extent ICH may be used. This might necessitate abiding by the customary laws or guidelines of the community involved. To this end, the UNESCO 2003 *Convention* requires the participation of the communities, groups and individuals that create, maintain and transmit such heritage, and also their involvement in its management within the framework of safeguarding activities.³⁸



Plate 5
Royal festivities in Fomban, Cameroon. Photo: Sultanat de Fomban.

Professor Catherine Bell, in describing the Canadian experience in managing Aboriginal ICH in museums, mentioned the importance of establishing codes of conduct for the proper control of indigenous materials in museums.³⁹ The use of Protocols has been implemented to ensure the protection of sensitive indigenous information in museums' management of native communities' cultural heritage. Protocols also ensure respect and equitable economic benefits.

5. Conclusion

Museums can contribute to raising awareness of ICH.⁴⁰ However, such exposure of ICH, while enhancing its intrinsic value and promoting the national patrimony, has the disadvantage of increasing its vulnerability. Unauthorised recordings, for example, or other cases of misappropriation/misuse related to IP rights could have a detrimental effect. Activities which disseminate ICH could actually threaten its very existence by exposing it too widely and could therefore be counter-productive. It is in this sense that the integration of ICH safeguarding in museums calls for the establishment of a policy about the legal protection of intellectual property to prevent misuse and misappropriation. The important thing is to know what policies are needed, while at the same time sustaining promising initiatives.

In the course of integrating ICH into their activities, museums are far from being creators of the ICH material used. Intellectual property issues related to the

ownership and misappropriation of ICH material arise at every stage: the collection, the cataloguing, the recording, the presenting, the conservation and the re-use of ICH materials.⁴¹ Also, there are issues related to the sacredness/secretcy of some ICH material when it is taken out of the traditional community context.⁴²

The use of ICH knowledge and practices in museums' preservation activities calls for the establishment of a policy about the management of IP rights. To this end, museums must understand who owns the material they are in possession of, how to get approval for its use, and what rights they have over the data. ICH needs museums because they are cultural institutions with great potential for the preservation, dissemination, and economic empowerment of communities' creative heritage. At the same time, museums need IP to support the ethical preservation of ICH within their collections. ❏

NOTES

1. Ripley, S. Dillon, quoted by James Deutsch, Smithsonian's Center for Folk and Cultural Heritage, International Conference on Museums and Intangible Heritage, Seoul 2012, Session II.
2. Article 2 (1) *International Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO
3. Cummins, Alissandra, 2012. 'The Absence of Presence: Caribbean Museums and the Museology of Slavery' in *International Conference on Museums and Intangible Heritage*, the National Folk Museum of Korea, Seoul, Korea, pp. 120 -129.
4. See Draft Articles, Protection of Traditional cultural expressions - Objectives, results at the conclusion of the WIPO- IGC's 22nd session, contained in WO/GA/40/7. See also Draft Articles, The protection of Traditional Knowledge, Policy Objectives, the results at the conclusion of the IGC's 21st session, contained in WO/GA/40/.
5. Set of Relevant Definitions /Glossary of Terms for Article 8(j) and Related Provisions.UNEP/CBD/WG8J/7/INF/1/Add.1P. 7.
6. See Weiner, Janice G., 1987. 'Protection of Folklore: A Political and Legal Challenge' in 18:1 *International Review of Industrial Property and Copyright Law* 57, quoted by Matip, Nicole Florence and Koutouki, Konstantia, 'La Protection Juridique du Folklore dans les Etats Membres de l'Organisation Africaine de la Propriété Intellectuelle' in *Revue Québécoise de Droit International*, 2008. 21.1. p. 252.
7. United Nations, 2009. *Report on the State of the world's indigenous peoples*.
8. Arup, Christopher. 'How are the Different Views of Traditional Knowledge Linked by International Law and Global Governance?' quoted by Antons, Christoph in *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*. Wolters Kluwer. pp. 71-72.
9. Literally from Hangeul, *Juldarigi*.
10. Article 2 (1) *Berne Convention for the Protection of Literary and Artistic Works*, Paris Act, July 24, 1971.
11. Article 27 (i) TRIPS Agreement.
12. 모시 literally from Hangeul, *Mosi*.
13. See *A tool for development, Organisation for an International Geographical Indications Network* (origin) at http://www.origin-gi.com/index.php?option=com_content&view=article&id=49Itemid=45&lang=en.
14. Article 22, TRIPS Agreement.
15. See Also Rangnekar, Dwijen, 2004. 'Geographical Indications: A Review of Proposals at the TRIPS Council' in *Demanding Stronger Protection for Geographical Indications: The Relationship between Local Knowledge, Information and Reputation*, United Nations University, Institute for New Technologies (INTECH), Discussion Paper Series No.2004-11, April 2004, available at: <http://www.intech.unu.edu>.
16. Cf. Otieno-Odedek, James, 2005. 'The Way Ahead-What Future for Geographical Indications?' Worldwide Symposium on Geographical Indications, jointly organised by the Ministry of Productive Activities of Italy and WIPO, Parma, Italy June 27th to 29th 2005.
17. Article 23 TRIPS.
18. Article 10 bis (2) *Paris Convention*.
19. Article 10 bis 3(1) *Paris Convention*.
20. Article 10 bis 3(2) *Paris Convention*.
21. Article 10 bis 3(3) *Paris Convention*.
22. Article 39(2) TRIPS.
23. Article 39(2)(a) TRIPS.
24. Article 39(2)(b) TRIPS.
25. Article 39(2)(c) TRIPS.
26. See Bottero, Nicola, Mangani, Andrea & Ricolfi, Marco, 2007. 'The Extended Protection of "Strong" Trademarks' in *Marquette Intellectual Property Law Review*. Vol. 11:2. At 268. Available at: <http://scholarship.law.marquette.edu/iptr/vol11/iss2/1>.
27. Nwabueze, Caroline Joelle. *The Protection of Traditional Cultural Expressions in OAPI States*, University of Turin. LLM Intellectual Property Thesis, Italy.

28. The trademarks or service marks shall be considered as collective marks where the conditions for their use are laid down in rules approved by the competent authority, and where they may be used only by enterprises of a public character, unions or groups of unions, associations, groups of producers, manufacturers, craftsmen or tradesmen, provided that the latter are officially recognised and have legal personality.
29. See Anderson, Jane. 'Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use', Conference Proceedings for Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena, American Library Association, The MacArthur Foundation, and Columbia University, New York, May 2005, at <http://correctingcourse.columbia.edu/program.html>. See also the database of protocols at <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>.
30. See eg. Article 2 (a) and 5-14 WIPO *Performances and Phonograms Treaty* (WPPT) 1996, which provides protection internationally for performers of expressions of folklore.
31. Article 10.2 TRIPS Agreement specifies that databases and other compilations of data or other material shall be protected as such under copyright.
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36. The Co-ordinating Ministry for People's Welfare of the Republic of Indonesia, *Indonesian Angklung*, Nomination File for inscription on the UNESCO *Representative List of the Intangible Cultural Heritage of Humanity*, 2009.
37. See in this sense, Caroline Joelle Nwabueze, 'The Preservation of Intangible Cultural Heritage in Cameroon', Korean Ministry of Tourism-UNESCO ICHCAP, December 2012, CPI Report. pp. 27-28.
38. Article 15, UNESCO, 2003 *Convention*.
39. Bell, Catherine, 2012 'Law, Ethics, and Respect for Indigenous Intangible Heritage in Museum Contexts', in *International Conference on Museums and Intangible Heritage*, the National Folk Museum of Korea, Seoul, Korea, pp. 217-225.
40. See in this sense Alissandra Cummins, 2006 "The Role of the Museum in Developing Heritage Policy", in Barbara T. Hoffman (Ed.), *Art and Cultural Heritage: Law Policy and Practice*. Cambridge University Press. pp. 47-51.
41. Wendland, Wend, 2005. 'Safeguarding Intangible Cultural Heritage and Protecting Creativity: Practical Mechanisms for Complementarity', Draft Paper prepared for the Sub-regional Experts Meeting in Asia on Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies, Bangkok, Thailand, December 13 to 16, 2005.
42. See in this sense 'Hi-tech Lego toys Bionicle game. Case: A third-party use of cultural signs representing sacred elements of the community tradition, has been found to offend the New Zealand Maori traditional communities'. quoted by Janke, Terri, *Minding Culture, Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO pp. 29-46.