



***Intellectual Property and  
Traditional Cultural Expressions and Traditional  
Knowledge: Key Issues***

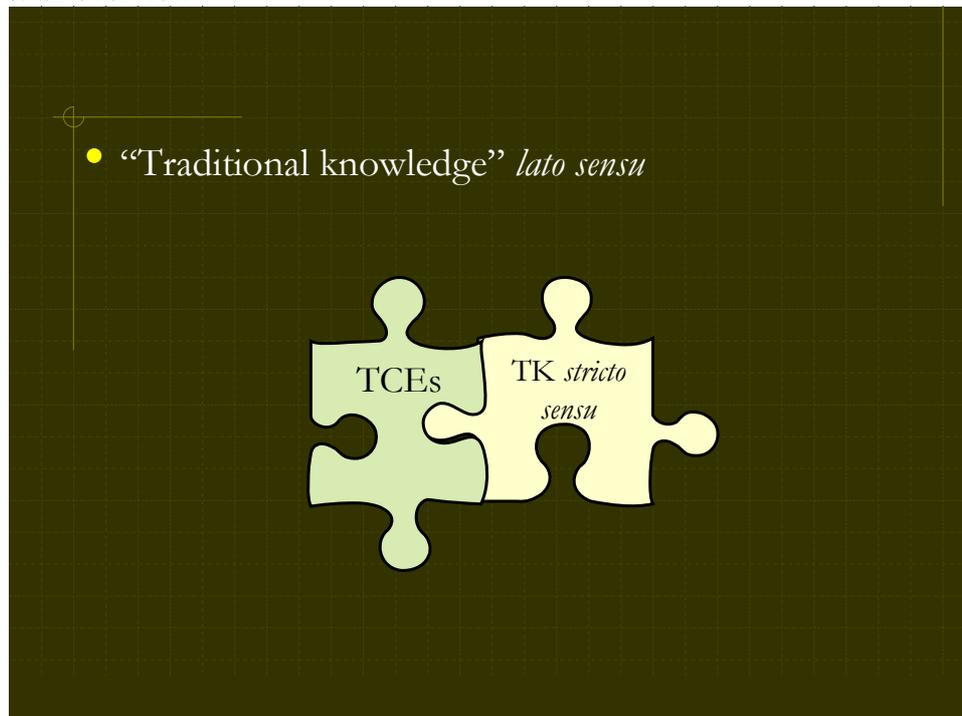
***by Wend Wendland, Head, Traditional Creativity,  
Cultural Expressions and Cultural Heritage Section,  
World Intellectual Property Organization (WIPO)***

Meeting: **95 SI - Copyright and other Legal Matters**  
Simultaneous Interpretation: **Yes**

**WORLD LIBRARY AND INFORMATION CONGRESS: 73RD IFLA GENERAL CONFERENCE AND COUNCIL**  
19-23 August 2007, Durban, South Africa  
<http://www.ifla.org/iv/ifla73/index.htm>

- The issues – an overview
- Past and ongoing work at WIPO – norm-building and capacity-building
- Libraries, archives and other cultural institutions – challenges and a possible framework for understanding and addressing them

The issues: an overview



*Traditional cultural expressions (TCEs):*  
or 'expressions of folklore' –

forms in which traditional knowledge and culture are **expressed, communicated and manifested** – may be tangible or intangible, or mixed

- e.g. traditional songs, performances, crafts, names, art, narratives, designs, architecture and motifs

*Traditional knowledge stricto sensu (TK):*

the **content** of know-how developed and transmitted through traditional, intergenerational means

- e.g. traditional medical knowledge, biodiversity-related knowledge

### *Traditional cultural expressions. . .*

- are handed down from generation to generation, either **orally** or by imitation,
- reflect a community's cultural and social identity,
- consist of **characteristic** elements of a community's heritage,
- are made by 'authors unknown' and are regarded as 'belonging' to a **community** under **customary laws**,
- are often not created for commercial purposes but as vehicles for religious and cultural expression,
- are **constantly evolving**, developing and being recreated within the community

### *Is there a problem? What is it?*

- Traditional cultural expressions and knowledge mostly communal, have old roots and are oral
- Intellectual property laws protect only 'original' works by known individuals, for a limited time, often only 'fixed' works
  - IP laws places traditional expressions and knowledge in the 'public domain' ('negative exclusionary effect')
- Productions based upon tradition can be protected as 'original' creations ('positive exclusionary effect')
  - but no legal duty to acknowledge or share benefits with tradition bearers

*Yet. . .*

- Existing copyright and related rights can protect TCEs to some degree
  - copyright protection for contemporary adaptations and interpretations
  - copyright for unpublished and anonymous works (Berne Convention, art. 15.4)
  - related rights protection for “performers of expressions of folklore” (WIPO Performances and Phonograms Treaty, 1996)
- Designs and trademarks laws also assist

*A threshold policy question. . .*

Should there be new IP-like protection for traditional cultural expressions and knowledge that are currently in the “public domain”, providing a “people” or “community” with control over their use outside the “customary context”?

## *From absorption to transformation. . .*

- “Square pegs and round holes” - a new subtle form of colonialism?
- However,
  - TCEs/TK now part of mainstream IP discourse (WIPO IGC)
  - A space for new voices and claimants in IP discourse (over 150 NGOs)
    - But - high expectations, non-IP aspirations
  - Ongoing evaluation of core IP principles (“fair use”, “public interest”, “public domain”, “author”, “original”, etc.)

## *The role, contours and boundaries of the public domain*

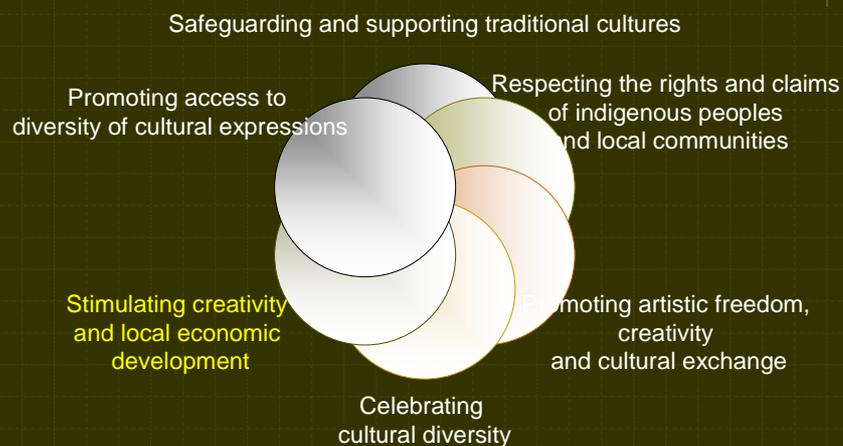
. . .TCEs of Europe’s various regions are part of the public domain. . . The exploitation of TCEs, even on a commercial scale, by persons outside the region where the folklore originates, has not been seen to have a negative impact. . . on the contrary, it has stimulated cultural exchange and fostered regional identities. . . authentic TCEs have become inherently better known and of higher economic value. . . those who advocate IP protection for their own TCEs would create monopolies of exploitation. . . exchange or interaction could thus be made more difficult, if not impossible.

(European Community, WIPO/GRTKF/IC/3/11.)

. . . the application of classical IP thinking and terms in the field of folklore might easily distort the picture and at best confuse issues. . .while it was admitted that TCEs might have been publicly available. . .this did not mean that such materials had fallen into the “public domain”, a term of art which suggested an expiration of protection. One was dealing with subject matter that had never enjoyed formal protection. Most communities had their traditional mechanisms for the protection of their TCEs.

Nigeria (WIPO/GRTKF/IC/9/14)

### *Setting policy goals*



## *Key issues*

### 1. Definition of TCEs/TK that should be protected

- what is a “traditional” cultural expression (and why should non-traditional expressions fall into the public domain)? when is a TCE “characteristic” of a community? Are all TCEs not the product of centuries old intermingling?

### 2. Who should benefit/hold the rights to protectable TCEs/TK?

- the place of individuals? the State? how to treat “national folklore”? contemporary communities? Registration? (see WIPO draft, articles 3 and 7)?

### 3. What objective for protection (economic, moral rights)?

- “defensive” and “positive protection”; preventing access to TK and TCEs? a positive right to exploit? ensuring benefit-sharing? promoting creativity and innovation? preventing IP rights over TCEs?

### 4. What forms of behavior considered unacceptable/illegal?

- what is the distinction between “legitimate inspiration” and “misappropriation”?

5. Any exceptions/limitations to rights attached to protected TCEs/TK?

- fostering the “public domain”? should follow-on creativity be permitted? special exceptions for libraries and museums (see WIPO draft, article 5); individuals? national folklore?

6. For how long should protection be accorded?

7. What gaps in existing IP system exist and need to be filled?

8. What sanctions or penalties should apply?

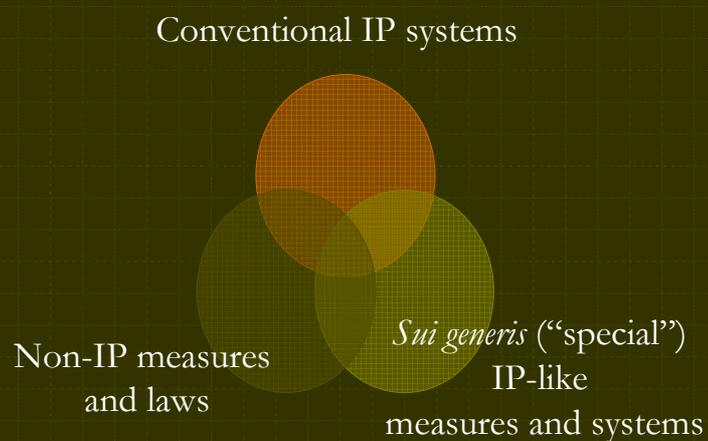
9. Division between international and national regulation

10. Treatment of foreign rights holders/beneficiaries

- **What** does one want to protect (subject matter)?
- **Why** does one wish to do so (policy objectives)?
- **Which** acts should be prevented/subject to prior authorization (scope of protection)?
- **Who** should benefit from this protection (rightsholders and beneficiaries)?
- **How** would rights be obtained and lost, managed and enforced (formalities, term, administration)?

Past and ongoing work at WIPO – norm-  
building and capacity-building

- Focus of WIPO's work on TCEs and TK is their protection, as forms of intellectual property, against unauthorized and inappropriate copying, adaptation and use
- This IP protection might be found in conventional IP systems (eg., copyright) and/or in special, IP-like systems and measures ("*sui generis*") and/or in other laws providing IP-like protection (eg., biodiversity access regimes or cultural heritage laws)



## *WIPO fact-finding and consultations since 1998...*



- Consultation with traditional healers, herbalists and birth attendants, Mpgi Health Project, Kasabanda, Uganda, September 6, 1998

## *WIPO Intergovernmental Committee*

- Establishment of WIPO Intergovernmental Committee in late 2000 and first session in **April 2001**
  - Member States, other organizations and NGOs
  - participation by indigenous and other local communities: speedy accreditation and **WIPO Voluntary Fund**
  - **current mandate** from WIPO General Assembly:
    - ◆ accelerated progress; no outcome excluded including possible development of an international instrument or instruments; focus on “international dimension”; no prejudice to work of other forums
  - eleven sessions held so far; 12<sup>th</sup> prov. scheduled for February 2008
  - WIPO General Assembly to review mandate September 2007

## *Draft provisions for protection of TCEs and TK*

- Draft provisions for **protection** of TCEs and TK **against misappropriation and misuse** (IP-like protection)
- *Sui generis* provisions, complementing existing IP protection and standards in other policy areas
- Most recent drafts: WIPO/GRTKF/IC/10/4 (c) (TCEs/folklore) and WIPO/GRTKF/IC/10/5 (c) (TK)
- Not yet adopted or agreed, but influencing national, regional and international processes

Libraries, archives and other cultural institutions – challenges and a possible framework for understanding and addressing them

## *Libraries and archives*

- Limits of purely legal claims and legal solutions
- This is really about re-assertion of cultural authority, preservation of context, cultural integrity, cultural sovereignty, respect
- Libraries and archives as repositories of indigenous and other cultural materials – fulfill vital preservation, educational, scholarly and access functions for benefit of whole society

“The crux of the problem is that  
information about us is not owned by  
us”

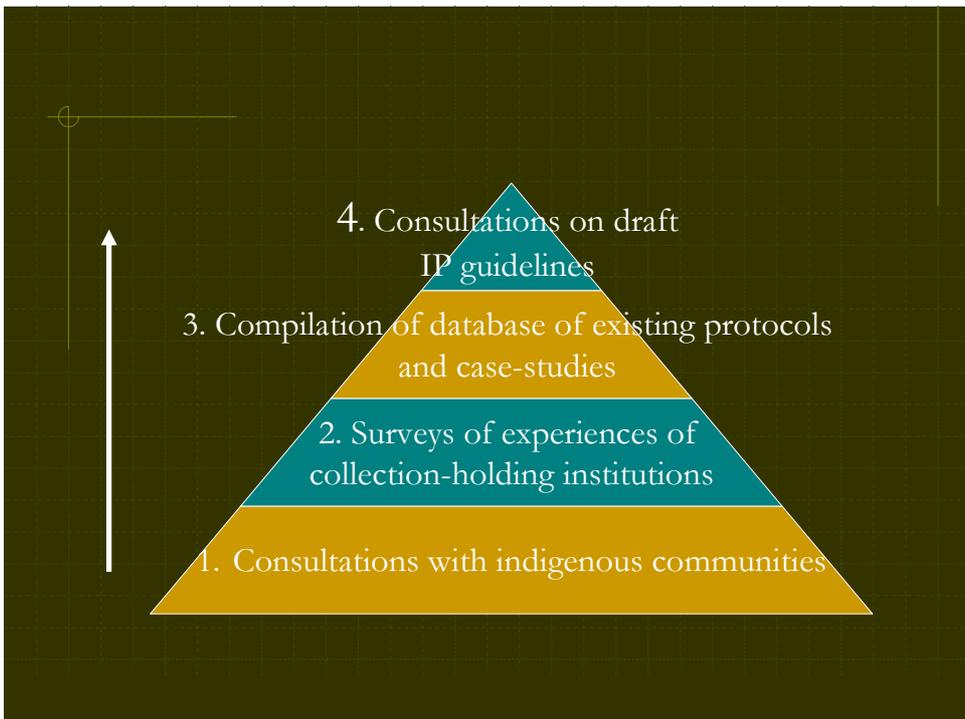
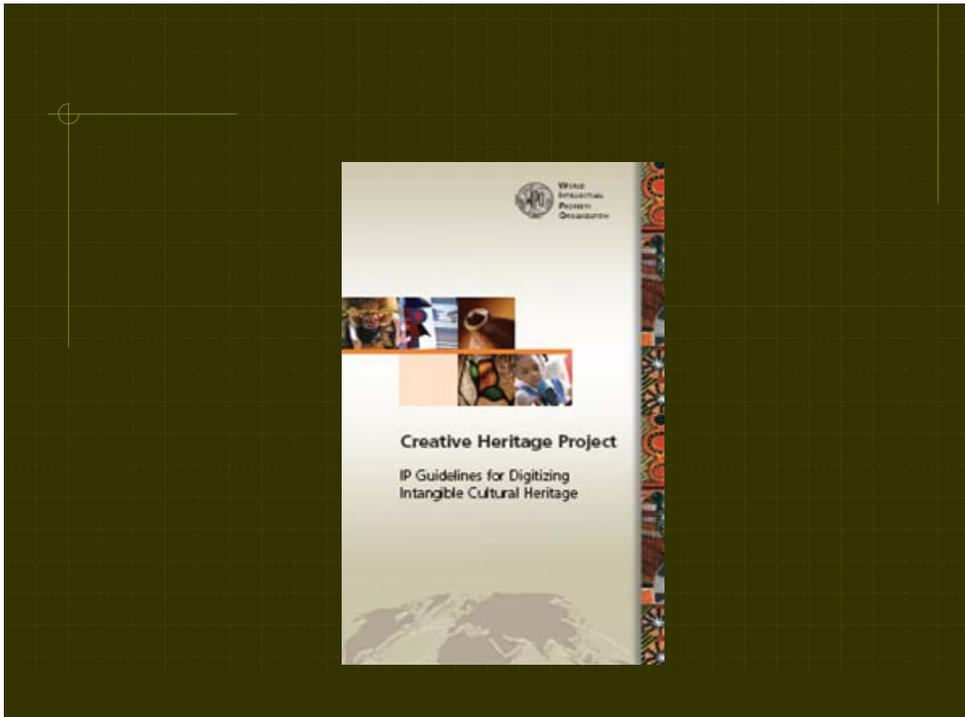
- Access to, ownership of, control over and authorship of indigenous materials held by libraries, archives, museums
  - complex ethical and legal questions
  - what role does copyright and other IP law play?

- Why are indigenous collections different and merit special attention?
  - provenance/authorship/ownership may be uncertain
  - sacred and secret/gender sensitive materials?
  - published and unpublished?
  - “public domain”?

## *Transitions. . .*

- Libraries and archives – from “owners” to “custodians”
- Indigenous peoples and local communities – from subjects of study to new users of library services and active participants in recording, (re) presenting, and re-using their cultural heritage – an emerging “indigenous public” (Anderson, 2005)

- Libraries and archives pivotal spaces within which issues of access, control, authorship, ownership and re-use of indigenous cultural materials can be discussed
  - emerging forms of collaboration between libraries and communities
  - role of new technologies (“digital repatriation”)
  - role of copyright and other IP law?
- Guidelines and protocols – building relationships



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## Surveys of Existing Practices, Protocols and Policies

Many institutions and communities have already developed valuable IP-related codes, protocols, policies, practices and standard agreements relating to the safeguarding of, access to, ownership of and control over cultural heritage.

WIPO has commissioned surveys of these existing resources and practices, which can serve as an empirical basis for the eventual development of best practices and guidelines. The surveys were prepared by experts commissioned by WIPO.

Short case-studies present informal summaries of some examples of these existing practices drawn from the surveys.

[Martin Skrudstrup](#) ["Towards IP Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage: A Survey of Codes, Conduct and Challenges in North America"](#)

[Executive Summary](#)

[Acronyms](#)

[Malia Talakai](#) ["Intellectual Property and Safeguarding Intangible Cultural Heritage: A Survey of Current Practices and Protocols in the South Pacific"](#)

### Case-studies

- [Brazil's Registry of Intangible Cultural Assets](#)
- [Fiji's Training Manual and Guidelines for Cultural Research](#)
- [Hopi Tribe's Protocol for Research, Publications and Recordings](#)
- [Museum of New Zealand Te Papa Tongarewa](#)
- [Omaha Digitization Project](#)
- [Policy Document, Australia](#)

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## Database of Existing Codes, Guidelines and Practices

This database comprises examples of codes, guides, policies, protocols and standard agreements relating to the recording, digitization and dissemination of intangible cultural heritage, with an emphasis on intellectual property issues.

The database responds to a widely-felt need for more empirical information on current experiences and practices concerning these issues.

These resources may serve as a basis for distilling IP-related "best practices" and guidelines.

The database is complemented by [surveys](#) commissioned by WIPO and [case-studies](#) drawn from the surveys.

The database can be searched by keyword, category, and country/region. Some resources may appear in more than one category.

The compilation is work in progress. Corrections and additions may be sent to [heritage@wipo.int](mailto:heritage@wipo.int)

- » [Resources for Museums and other Collection-Holding Institutions](#)
- » [Resources on Inventory-Making](#)
- » [Resources for Researchers and Field-Workers](#)
- » [Resources for Commercial and Other Users](#)
- » [Resources by Indigenous and Local Community Organizations](#)
- » [Standard Agreements, Consent Forms, Licenses and Undertakings](#)
- » [Technical Standards, Indexical Languages and Thesauri](#)
- » [Professional Societies' Codes and Statements of Ethics](#)
- » [Intergovernmental Instruments, Declarations and Guidelines](#)
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## Database of Existing Codes, Guidelines and Practices

### Search Database

Category: Resources for Museums and other Collection-Holding Institutions  
 Resources on Inventory-Making  
 Resources for Researchers and Field-Workers  
 Resources for Commercial and other Users  
 Resources by Indigenous and Local Community Organizations

Keywords: Art  
 Copyright  
 Digitization  
 Fieldwork  
 Film

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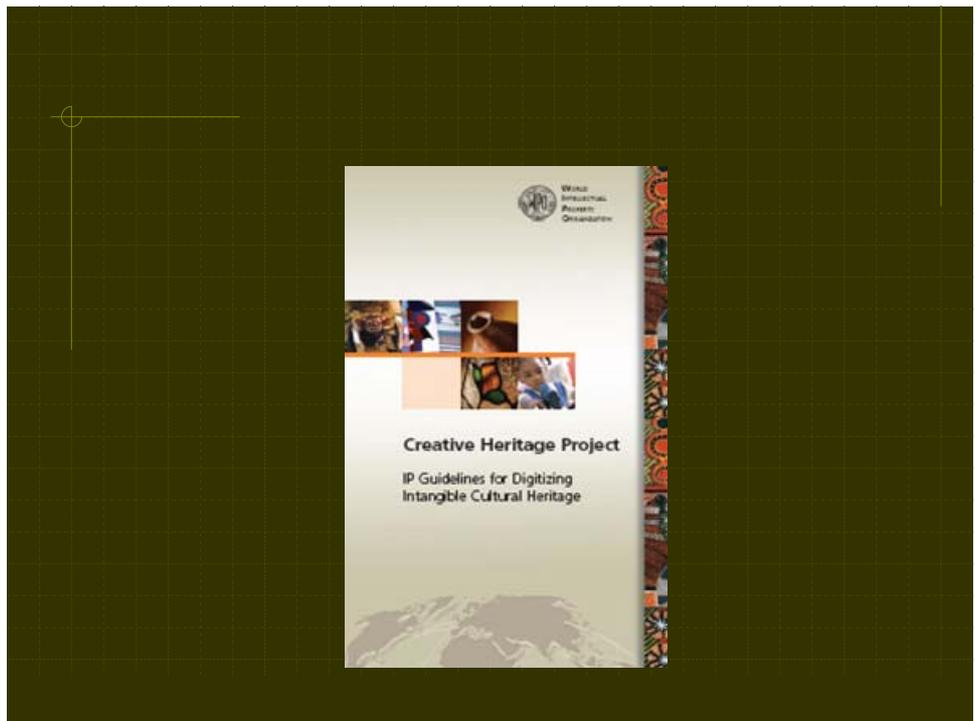
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*Thank you*

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