

American Library Association

**Cultural Heritage and Living Culture: Defining the U.S. Library Position on
Access and Protection of Traditional Cultural Expression**

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**Wend Wendland¹
Keynote Address**

**“Libraries, Intellectual Property and Traditional Cultural Expressions:
Balancing Access and Control”**

I was not only deeply honored but also surprised and intrigued when Carrie Russell invited me to deliver the Keynote at this conference aimed at “defining the US Library Position on Access and Protection of Traditional Cultural Expression”.

Why did the ALA invite an intellectual property (IP) lawyer such as myself?! My surprise stems from a recognition that IP issues regarding access to, ownership of and control over traditional cultural expressions (TCEs) only lie at the surface of deeper, complex contestations relating to the production, preservation, use, re-use, and regulation of information about indigenous peoples and indigenous knowledge and cultural materials.

Collections of indigenous knowledge and cultural materials raise therefore specific challenges for libraries, archives and other information services, arising from the complex historical, cultural, legal and political conditions under which the collections were established. In acknowledging these challenges, we recognize that there are different traditions in knowledge management and different world-views and rationalities of preservation, access and use at play. Indigenous persons, some of whom are here at this conference and will speak eloquently for themselves, increasingly question issues of ownership, access and control, and wish to become more directly involved in if and how they are documented, presented and represented. These claims remain difficult because they often explicitly expose the politics and historical circumstances that led to the development of the collections in the first place. This is not always a comfortable

¹ Head, Traditional Creativity, Cultural Expressions and Cultural Heritage Section, World Intellectual Property Organization (WIPO), Geneva, Switzerland. Any views expressed in this address are, however, entirely those of the speaker and not of the WIPO Secretariat or any of its Member States.

discussion. But a considerable amount of work is being done on changing the relationship between libraries and other cultural institutions and indigenous peoples, as others here will speak much more about in the next days.

I recognize therefore that IP issues should be seen and understood within this larger frame. Indigenous concerns are really ultimately about cultural authority, preservation of context, cultural integrity, and cultural sovereignty. IP issues are present but perhaps not the most important; IP may or may not be part of the problem or solution.

I congratulate the ALA for having convened this conference on a topic such as this. I was intrigued when I first heard about this conference because the protection of TCEs does raise complex questions for the library community. Here I wish to offer two observations.

First, indigenous claims for greater protection of indigenous knowledge systems and cultural materials lie, albeit perhaps only superficially, at right-angles to some of the core objectives of libraries and other information services, such as: freedom of speech, intellectual freedom, diffusion of knowledge, research and learning, access to information, and preservation of cultural heritage. In order to achieve these goals, librarians, archivists and other information professionals argue for greater flexibilities within IP law, a more robust and broader public domain and a global approach to limitations and exceptions. On the other hand, certain indigenous representatives reject the notion of the “public domain” and seek absolute and perpetual control over all aspects of their cultures. In defining a position on TCEs, therefore, it seems that the library community would need somehow to reconcile competing claims for “access” and “control”. How would the ALA do so, I wondered?

Yet, second, libraries, archives and other information services, with a deep commitment to preservation and access, and openness and equity, lie at the cross-roads between indigenous communities and the general public, and can, as Jane Anderson has written so poignantly, provide a pivotal space for mediating issues of ownership, control and access. This is not to suggest that libraries ought to play a formal role in dispute-resolution, but libraries and archives have been proactive in responding to indigenous peoples as new user groups. Here the focus is on changing behavior, establishing trust and guiding modes of conduct through the development of protocols and “best practice”. Much is already being done by libraries and archives around the world to foster greater respect for and recognition of living but distinct knowledge systems and traditions in knowledge management. Practical experience in Australia and elsewhere has shown that through the use of protocols and practical collaborations, new, mutually beneficial partnerships

between libraries and archives and indigenous peoples are possible and richly rewarding. The records of family and clan histories and other collections of libraries and archives may play a role in proving or disproving indigenous claims to protection of elements of their living heritage; the technologies of libraries and archives may be usefully employed by indigenous communities to preserve and revitalize their cultural traditions, and create anew on the basis thereof. We will hear more about the Australian and other experiences in the next days from some of the experts participating in this conference.

So, again, my congratulations to the ALA for having convened this timely and interesting conference. I am honored to have been invited to make this opening address and I look forward to listening to the many experts from around the world who will be speaking throughout the conference.

TCEs and IP protection

The possible protection, in an IP sense, of expressions of folklore/TCEs, has been on the international IP agenda for more than 40 years; an African Study Meeting on Copyright in Brazzaville in 1963 was one of the first times at which the international protection of expressions of folklore was discussed. In these early years, work on folklore was generally conducted jointly by WIPO and UNESCO, with WIPO focusing on the “legal protection” of folklore (protection in an IP sense) and UNESCO on its “material protection”, i.e. its preservation or safeguarding. Within WIPO, the protection of folklore was treated exclusively as a copyright issue. This phase of work ended, one might say, in about 1985, when an attempt, by both WIPO and UNESCO jointly, to establish a new treaty for expressions of folklore failed.

More recently, in 1997, WIPO established a new “global issues” program which had as one of its aims the identification and inclusion of “new beneficiaries” of IP, including specifically indigenous peoples and other custodians and bearers of traditional knowledge, genetic resources and expressions of folklore. A period of wide consultations, research and fact-finding followed, and in late 2000, an Intergovernmental Committee was established to discuss these issues further.

Much had happened in the intervening years between 1985 and 1997 which led to this development, including the adoption of the Convention on Biological Diversity in 1992, the beginning of work on a draft Declaration on the Rights of Indigenous Peoples, and a growing regard for the need to safeguard intangible cultural heritage (following on from and complementing the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage) and to foster cultural diversity.

This program, which I am the sole-surviving founding member of, is still running, and much has happened since its establishment, at international, regional and national levels. Many countries and several regional organizations now have specific legislation aimed at protecting TCEs. There is, however, as yet no single, comprehensive international instrument for the protection of TCEs.

In the remaining parts of this address, in relation to IP and TCEs I will say some words on:

1. What is the issue?
2. What are some of the challenges?
3. What is happening at WIPO?

What is the issue?

It has been said that trying to protect TCEs by conventional IP systems is like trying to fit a square peg into a round hole. This can refer to formal requirements of conventional IP systems which tend to exclude what we commonly understand to be TCEs. It is well known, for example, that in order for a work to be protected by copyright, it has to have had an identifiable author; on the other hand, TCEs are produced through a dynamic interplay between individual and collective creativity and are regarded as collectively held. TCEs probably had an author at some stage but that author is today unknown or unlocatable. What's more, many national copyright laws require a work to be fixed in some material form before it may be protected, yet TCEs are very often only manifested, practiced, passed on and preserved in oral form. The limited term of protection provided to copyright works is also cited as a shortcoming in conventional copyright systems in so far as TCEs are concerned.

At the same time, while these formal requirements may be said to positively exclude TCEs from protection, TCEs are also *negatively* excluded, in the sense that because TCEs are regarded as ‘public domain’ by the formal IP system, contemporary adaptations and interpretations of TCEs are protectable, irrespective of the identity of the creator and his/her relationship or absence thereof with the community that is the bearer and custodian of the underlying TCE.

These technical exclusions are symptomatic of more profound divides between the objectives for and kind of protection offered by the IP system and the aspirations of indigenous peoples. The copyright system regulates access to and use of literary and artistic works and facilitates their diffusion, especially for economic

exploitation. TCEs, on the other hand, are often made for local consumption, are often created for spiritual and religious purposes and embody communal identities, belief systems and values. Their primary value to the community is not economic. Indigenous peoples desire that their TCEs be safeguarded against all forms of unauthorized access, use and diffusion, in perpetuity.

The current copyright system is not a system of perfect control, however – exceptions and limitations play a necessary balancing role, and the “public domain” is an integral and key part of the system. For example, under copyright, it is permissible to “borrow from” someone else’s work.

These “gaps” in the system are not arbitrary – they are the result of conscious policy choices made by the framers of current IP systems and are necessary to balance the interests of creators and of the general public.

Current IP systems date back many years – the notion that property rights could vest in intangible things may be said to date back to classical Roman law and the first copyright laws which approximate those which we have today first appeared in the 18th century in England. The first international copyright treaty, the Berne Convention, dates from 1886. This is at the same time of course as Darwinist cultural hierarchy theories began to take hold – and just as such theories were perhaps used to disentitle indigenous peoples from their lands, waters and natural resources, so too they provided a justification – even subconsciously – for excluding collective creation from what was protectable by IP law.

Yet, it is also well-known by now that the existing IP systems do provide some protection to TCEs, and here I refer in particular to copyright and related rights. I will not this evening address the usefulness of collective and certification trade marks, geographical indications, the protection of confidential information and the law of unfair competition.

Much has been written about this, and I simply recall that copyright protection is available for:

1. Contemporary versions, interpretations and adaptations of pre-existing traditional cultural expressions;
2. Article 15.4 of the Berne Convention provides protection for the unpublished works of unknown authors;
3. Recordings of TCEs are protected as “sound recordings” (and it is worth noting that the right of remuneration applicable to sound recordings published for commercial purposes for broadcasting or communication to the public (Art 15, WIPO Performances and Phonograms Treaty, 1996)

- may be extended to sound recordings of TCEs even if they are not published for commercial gain);
4. Performances of TCEs are protected (and performers share in the right of remuneration just referred to);
 5. Moral rights – rights to attribution and to prevent the distortion of works - can vest indefinitely;
 6. Collections and compilations of TCEs are protectable as such.

For a detailed treatment and discussion of these forms of existing protection of TCEs see a “gap analysis” recently produced by the WIPO Secretariat at the request of WIPO’s Intergovernmental Committee (WIPO document WIPO/GRTKF/IC/13/4(b)).

However, despite these existing forms of protection, there is, I could say, a widespread view that some interventions are needed in order for IP systems to respond more adequately to the aspirations and needs of indigenous peoples. Many believe that a distinct and comprehensive system is needed, a *sui generis* system, to address the protection of TK and TCEs. But this is by no means a universal view.

Some of the larger questions are:

1. Should new IP standards be established? Or, are existing IP systems simply under-utilized?
2. Should one positively include indigenous creativity within IP systems, or rather ensure that IP systems do no harm? Indeed, what is meant by “protection” – protection of TCEs by IP, or protection of TCEs against IP?
3. To what extent are IP tools truly relevant for addressing indigenous peoples’ concerns? What role should customary legal systems and protocols play? How useful in meeting indigenous peoples’ aspirations are cultural heritage preservation laws, consumer protection laws, laws against blasphemy, human rights laws, biodiversity and environmental laws etc, and what role does IP have in complementing these other areas?
4. At what level should action be undertaken: international, national and/or local levels?
5. What is the role of legislation and law-making? Should TCEs be protected by a system of publicly created and overseen rights, or through solutions found in private law (such as through the law of contract and the use of protocols) and in the private application of technological solutions?

What are some of the challenges?

The protection of TCEs raises several challenges – legal, policy, political, cultural and operational.

There is a renewed appreciation, however, that collective creativity is deserving of protection and a concerted search is underway for appropriate ways in which the IP system can better respond to the needs and aspirations of indigenous peoples. As Dr. Francis Gurry said on September 22, 2008 in his acceptance speech on assuming the Director Generalship of WIPO, “it is time to move [the WIPO Intergovernmental Committee] process to concrete outcomes that will see WIPO embrace a broader base of constituents and a more universal mission...”.

At the same time, there are other transformations within the world of IP sparking intense conversations on what are the best models for production, regulation, diffusion and use of information and knowledge. It has been said that the IP system is moving from an “all rights reserved” to a “some rights reserved” model, and we are all aware of a growing interest in access to knowledge (a2k), in “open source” models, and in a richer, larger and more robust public domain.

It has been suggested, however, that the push for a richer and more robust public domain is taking place without reference to the concerns of indigenous peoples in relation to their TK and TCEs. Calls for greater access to knowledge seem at times to regard all information and knowledge as inherently “homeless”. Kathy Bowrey and Jane Anderson go on to point out that “despite pretensions as a social movement, the global humanitarianism of furthering access to knowledge has progressed with no Indigenous involvement, consent or inclusion.”

There seems a need to reconcile calls for a more expansive and robust public domain with calls for new protection for indigenous heritage which is currently regarded as “public domain”. A challenge, I would suggest, for librarians and others concerned about access to and the diffusion of information, are statements from some indigenous representatives that there is “no public domain in traditional knowledge”. Further, very expansive definitions of the subject matter that ought to receive protection go well beyond what would usually be protected by conventional legal systems established to protect intangible things. Debra Harry and Le’a Malia Kanehe, two indigenous experts, write for example that “Indigenous cultural property is everything that Indigenous peoples have a relationship with and responsibility to”. The recently adopted UN Declaration on the Rights of Indigenous Peoples suggests absolute rights of control over indigenous intellectual property.

Is there, therefore, a need to reconcile a certain absolutism in what indigenous peoples seek with an IP system which is, by design, not one of perfect control? I

suggest this is a question that librarians will face and will discuss valuably. I don't pretend to have the answer, but it seems to me that the two positions are not necessarily irreconcilable. Preston Hardison and the other experts participating in this Symposium will have valuable views on this question.

What is happening at WIPO?

To end, I will say a few words about the work being undertaken at WIPO, especially by the Intergovernmental Committee (the IGC).

The IGC as a process

The IGC has now met 13 times; its mandate states *inter alia* that “no outcome is excluded, including the possible development of an international instrument or instruments”. Many take this as a cue for the development of a stand-alone *sui generis* system for the protection of TCEs, and, several countries and regional organizations have developed national and regional *sui generis* systems, as I have already mentioned. The IGC also has its own successful Voluntary Fund to finance the participation of representatives of indigenous and local communities in sessions of the Committee. Indigenous and local community, NGO and civil society participation in the work of WIPO on these issues is extensive. The Library Copyright Alliance has been a valuable participant in the work of the IGC, and I strongly encourage the library community to continue this engagement.

The IGC is a remarkable process, for many reasons and at many levels. Let me just mention two of its features.

First, the work of the IGC, based on several years of wide-ranging and inclusive consultation, has launched an important and ongoing re-evaluation of core IP concepts such as “authorship”, “originality”, “fair use” and the “public domain” and prompted fresh and healthy contemplation of time-honored principles relating to fixation, formalities and limitations and exceptions. The significance of the discussions taking place in the IGC go, I would suggest, beyond TCEs and TK, therefore.

Second, the IGC's work has opened IP policy development to a wide range of new interest groups. Rosemary Coombe writes: the IGC has become “an important forum. . . to recognize, protect, and promote the creativity and innovation of peoples who have traditionally been excluded from or otherwise failed to benefit from the conventional systems of IPRs...[this has] brought a diverse set of new interests and agendas into international IPR negotiations.”

Some of the ideas being discussed within the IGC

As I have mentioned, there is no consensus internationally that new rights in TCEs are desirable or necessary. Yet, several countries have or are developing *sui generis* systems, and at the international level in the WIPO IGC, a draft set of substantive provisions has been prepared and is under consideration, amongst other documents. I do not have the time this evening to describe these draft provisions to you in detail. In short, they provide for protection of TCEs that are the results of human intellectual activity, including collective creativity; the rights holders are identified as those indigenous and other communities who maintain, use or develop the TCEs as part of their heritage and identity; the protection granted would be in the form of a moral right and right of remuneration, although an exclusive right could be obtained for TCEs of particular cultural or spiritual significance which are first registered and examined; TCEs would be protected for so long as they remain integral to the heritage and living culture of a community; and, there would be exceptions for the making of recordings and other reproductions of TCEs for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes. The draft provisions – first published in 2005 and since then subject to two open commenting processes - are available on WIPO's website.

However, significant uncertainty still remains within the IGC on key questions such as, to summarize them very simply:

- What is a TCE?
- Why should TCEs be protected?
- Who should benefit from the protection of TCEs?

For example, as cultures are largely intermingled, have borrowed from each other over the millennia and are still today shared by more than one community, how would “ownership” be determined?

- How should TCEs be protected?

Capacity-building programs of WIPO

At the beginning of this address, I referred to opportunities libraries and other information services are seizing to foster greater recognition of the interests of indigenous peoples and to work collaboratively with them in mutually-beneficial partnerships.

Coming full circle back to the beginning of this address, let me then end with a brief reference to a capacity-building project at WIPO that (i) addresses the very issue of how libraries, archives and museums respond to and manage IP and TCE

issues in practice, (ii) recognizes the role of protocols, codes of ethics and “best practice” as adjuncts to legislation and law-making and (iii) seeks to foster positive forms of collaboration between communities and cultural institutions such as libraries, archives and museums.

This project – under the auspices of WIPO’s Creative Heritage Project – is:

1. Developing a guidebook for libraries, archives and museums on IP and TCEs/TK;
2. Has established a publicly searchable database of existing protocols, codes of ethics, model licenses used by libraries, archives, museums and other cultural institutions, professional associations and indigenous peoples;
3. Is publishing surveys of the experiences and practices of museums, libraries and archives in this area; and,
4. Has established a practical hands-on training program in cultural documentation, archiving and IP management for indigenous communities and museums, libraries and archives. I am delighted that we offer this program in partnership with the American Folklife centre at the Library of Congress and the Centre for Documentary Studies at Duke University, and the first pilot program took place a few weeks ago. A Maasai community and the National Museums of Kenya were the first participants in the course.

Conclusions

I conclude by restating how timely and pertinent this symposium is, and reiterating my thanks to the ALA for having invited me.

While the core values and objectives of libraries and other information services may seem at times at odds with the aspirations of indigenous peoples in so far as protection of their TCEs are concerned, practical experience has shown that there are possibilities for mutually-beneficial collaborations between communities and libraries. There are complex historical conditions lying behind today’s conversations over ownership, access to and control of indigenous knowledge and cultural materials, and contests over IP form only a part of these. Managing these IP issues in an appropriate and sensitive way could contribute towards the easing of those larger and more complex conversations.

The IP-like protection of TCEs is still controversial, and there are as yet no certain answers to the critical What, Why, Who and How questions I posed earlier. New legislation may not ever result from processes such as the IGC. In that case, practice and behavior become all the more crucial and, there, I believe libraries,

drawing upon their core values and practical experiences to date, can make a key contribution.

Many thanks for your attention.