



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

The conference convened at the Madison Hotel in Washington, D.C. on the evening of November 12, 2008. Keynote speaker Wend Wendland, Head of the Traditional Creativity, Cultural Expression and Cultural Heritage Section of the World Intellectual Property Organization (WIPO), spoke to conference attendees about the challenges of protecting and accessing cultural products of indigenous peoples around the world. A theme Mr. Wendland addressed would surface again and again at the conference—existing intellectual property (IP) definitions and frameworks do not adequately fit the specific concerns associated with protecting traditional cultural expression (TCE). Mr. Wendland also identified and discussed current efforts by his section of WIPO to address TCE intellectual property issues, including a reanalysis of IP principles and definitions, existing treaties and draft provisions. Mr. Wendland acknowledged the need for a broader base of constituents and more input from librarians, archivists and museum personnel into WIPO discussions and processes regarding this important and growing concern.

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Day two of the conference began with a panel introducing the legal and ethical issues surrounding the protection of and access to traditional cultural expression. Speaker Michael Taft, Head of the Archive at the Library of Congress' American Folklife Center, chronicled the difficulty indigenous peoples and traditional communities face in protecting their cultural products and noted that efforts by WIPO continue to fall short in their failure to move beyond the economic debate and address the moral and ethical issues of TCEs. Taft reminded conference participants that intellectual property is not about protection but about facilitating dissemination. He suggested that indigenous peoples and traditional communities must be allowed the self-determination to take care of their own cultural history, and that librarians, academics and archivists are uniquely positioned to help them.

Speaker Kay Mathiesen, the School of Information Resources and Library Science at the University of Arizona, addressed the natural tension between library values of access and preservation of information and protection of indigenous peoples' traditional cultural expression and knowledge. She suggested a number of ways these groups can proceed to work together, including the establishment of overlapping consensus and the creation of a common space in which to discuss acceptable access and limitations to that access. Mathiesen suggested that the concept of privacy might be the most useful place to identify and operate within such a common space.

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Michael Shapiro, Acting Sr. Counsel for the USPTO's Office of Intellectual Property Policy and Enforcement, began panel two (Perspectives from WIPO: Opinions) with a short history of initial efforts to define IP solutions for traditional cultural expression. He then noted current efforts of the IGC to create a set of objectives and principles that will help develop national discussions and additional models of access and protections.

Jamie Love, Director of Knowledge Ecology International, then suggested that current models and concepts of copyright protections do not have to be dismissed out of hand when thinking about TCE rights and access. Specifically, creative licensing could be used to establish a bridge between protectors and users of TCEs. By creating a set of intermediaries, governments and indigenous peoples could ensure transparency and accountability.

Finally, Preston Hardison, Watershed Policy Analyst for Tulalip (Tribes) Natural Resources, noted the continued (and evident at the conference) tension between those who consider the issue to be largely economic and those who feel the debate is a moral/ethical one. Hardison suggested, like many at the conference, that there is a way to approach compromise by focusing not on the extremes but by finding common ground. He also noted that the Tulalip Tribes are currently working on their own IP code so they can be included in discussions at the national and international levels.

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Following Q&A for panel two, the conference broke for lunch and heard remarks from Professor Peter Jaszi, Faculty Director of the Glushko-Samuelson Intellectual Property Clinic, Washington College of Law at American University. Prof. Jaszi's talk, entitled "*Two Cheers for TCE Protection – What an IP Skeptic Learned in Indonesia*," related his visit to New Caledonia and participation in one of the first efforts to address indigenous peoples' concerns regarding TCE rights. While he returned with a number of valuable insights into indigenous peoples' concerns regarding TCE protection (lack of access to domestic audiences, breakdown of intergenerational transfer of arts and traditions, counterfeits and mis- or non-attribution), Prof. Jaszi found most interesting the concerns they did not have: stylistic interpretation and general misappropriation (though there was some concern about large-scale, commercial interpretations) and offensive uses of TCEs (throughout Indonesia there is a strong functioning infrastructure that restricts access to the most secret and sacred TCE material).

Prof. Jaszi admitted that the findings of his group are controversial, for internal consumption only and not for use on an international stage. He closed with the point their indigenous hosts made over and over: the law is not what they need. What they need is real, material support now. If their cultural traditions and products are to survive, they need support and help immediately to ensure that survival.

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Panel three addressed Indigenous Perspectives on Intellectual/Cultural Property Rights and Access and began with a talk on access and control by Lorlene Roy, Professor at the University of Texas, past ALA President and Anishinabe, member of the Minnesota Chippewa Tribe. Ms. Roy highlighted another constant theme of the conference—the idea that discussions regarding

rights of indigenous peoples and access to their cultural products must begin with the inclusion of said peoples in the conversation.

Following, Spencer Lilly, Maori Services Manager for New Zealand's Massey University Library System, provided an overview of the Maori people, their heritage, and their role in New Zealand culture. He noted that despite the pervasive presence of Maori TCE, New Zealand intellectual property law does not effectively address indigenous rights or protections, and chronicled a number of egregious misappropriations and misuse of Maori TCE.

The panel's third speaker, Martin Nakata, Chair of Australian Indigenous Education and Director of Jumbunna Indigenous House of Learning at the University of Technology in Sydney, addressed innovations in Australian libraries designed to provide access to traditional cultural products. He noted that these collaborative efforts between indigenous peoples and libraries, archives and museums have confirmed the validity of a number of the issues already addressed at the conference. Nakata reported that a useful strategy has been to focus on digitization for preservation and safekeeping and, in the process, mandate access, care and use with guidelines, protocols and high standards of practice. He noted his next collaborative research project will begin in 2009.

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Panel four of the conference focused on the challenges unique to libraries and archives concerning the management of TCEs. Speaker Kimberly Christen, Associate Professor at Washington State University, reported on the process of organizing and managing access to traditional cultural knowledge of the Tenet Creek community. She explored, with the conference participants, the Murkutu Indigenous Archive Tool built in collaboration with indigenous peoples and archivists to acknowledge access as not "open" or "closed" but as a constant "dialogue." Christen also introduced the concept of Reciprocal Curation—collaborative research, design and display—and noted the Plateau Peoples Web Portal project launching in April 2009.

Michael Taft of the American Folklife Center spoke again as part of panel four, and enumerated a number of projects in which the center has been active in collaborating with indigenous peoples to help them create protocols for preservations and guidelines for access including the Federal Cylinder Project and the Omaha Indian Recordings. In describing these projects, Taft highlighted a number of the challenges facing archivists and indigenous peoples including storage location, digitization, collection management and training.

Robert Leopold, Director of the National Anthropological Archives and Human Studies Film Archives for the Smithsonian Institution, focused on the challenges of archiving and managing collections of traditional cultural expression, including the pros and cons of digitization and archiving material that is constantly changing. Leopold also addressed the complications of accepting donor restrictions and draft agreements; he noted that ethics statements from professional institutions would be a good starting point for addressing these and other challenges.

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Day three of the conference convened with panel 5, an examination of why traditional IP and copyright frameworks do not work with traditional cultural expressions and a look at other models and alternatives. Debra Harry, Executive Director of the Indigenous Peoples Council on Biocolonialism, noted that first and foremost, indigenous peoples are not stakeholders, but rights holders. She elucidated a number of reasons why trying to fit TCE into traditional western intellectual property frameworks is not a sustainable solution by comparing the components of each. Finally, she noted that any discussion must begin with the indigenous peoples asserting sovereignty over their products and knowledge (The Indigenous Research Protection Act, Model Tribal Research Code), establishing regulations for research, and acknowledging limitations and prohibitions.

Rebecca Tsosie, Professor of Law at Arizona State University, continued the panel with a look at alternative frameworks for legal protections of TCEs. She suggested, like Debra Harry, that the issue is largely one of governance on three levels—international, domestic and tribal. Prof. Tsosie asserted that returning to the model of the repatriation act and extending the resulting collaborations and partnerships to address protection and access will ultimately be more successful than attempting to apply traditional western concepts of intellectual property protection.

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The final panel of the conference addressed new and emerging technologies that will impact the protection of and access to traditional cultural expressions. Speaker Ramesh Srinivasan, Assistant Professor in the Department of Information Studies at UCLA, touched on a number of these new technologies and subsequent effects with an examination of the Tribal Peace Project, an effort to create a “tribal digital village” with Southern California and Northern Baja reservations, and the creation and management of digitized version of Zuni TCEs at Cambridge. Through these collaborative efforts, establishing effective research relationships, and defining ownership, appropriate legal frameworks will emerge instead of being the starting point.

Greg Younging, Assistant Professor of Community, Culture and Global Studies for the Irving K. Barber School of Arts & Sciences at the University of British Columbia, examined the current use of technology by indigenous peoples and the underlying tension of the traditional world colliding with western world tools and concepts. Younging explored a number of myths regarding indigenous use of technology and offered a differing view—namely that through history indigenous peoples have take opportunities to consider and often adapt western technologies to their existing cultures (e.g., the legacy of IP artist Bill Reid).

Finally, Eric Kansa, Executive Director of the Information and Service Design Program at UC-Berkeley’s School of Information, addressed the intersection of TCE, indigenous peoples’ rights and the Digital Commons. Like several other speakers, Kansa suggested that starting with small collaborative projects, specific licenses (like Creative Commons licenses), bottom-up classification systems will avoid the excessively complicated efforts conducted on a global scale that may not be as successful long-term.

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Following the panels, a community discussion commenced around the question of next steps. Moderators suggested participants consider two questions: What are the components of a policy document that would address these issues; and what values are associated with these components?