

# #Global Digital Encounters

Intangible Cultural Heritage and Intellectual Property

## INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY

Encounter 13

### FINAL REPORT

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**Prof. Benedetta UBERTAZZI**, Full Tenured Aggregate Professor of European Union Law, Università degli Studi di Milano-Bicoca.

**Dr. Harriet DEACON**, Consultant, intangible heritage and intellectual property law. Coventry University

**Prof. Dr. Tuomas MATTILA**, LL.M., M.Soc.Sc, Doctoral Fellow in the University of Helsinki

**Alexander PARRA PEÑA**, Lawyer, Coordinator - Implementation of IP Rights in handicrafts in Colombia (Artesanías de Colombia)

### Introduction

In a post-crisis environment, re-imagining Intellectual Property (IP) may mean better understanding and further enhancing its role for society in supporting the safeguard, protection, and promotion of Intangible Cultural Heritage (ICH). How may both the economic function of IP and its social function support preservation and valorization of ICH? Will the complex period of economic recovery leave more space to it than in the past? Can multilateral treaties be developed or expanded in this respect? Which relation is to be developed between ICH and IP in a sustainable development and indigenous people-oriented perspective? Speakers from various continents, with a variety of opinions will provide a worldwide picture of the future of ICH and IP in a profoundly transformed world.

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Prof. Benedetta **UBERTAZZI**: The cornerstone of the protection of ICH is the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The Convention seeks to avoid engaging with questions related to IP. As stated in the Art. 3(b) of the Convention, "*nothing in this Convention may be interpreted as affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights*". However, from the Operational Directives for the 2003 UNESCO Convention do address IP rights. It is mentioned that "*States Parties shall endeavour to ensure in particular through the application of intellectual property rights... that the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage are duly protected when raising awareness about their heritage or engaging in commercial activities*". Many communities have also in practice also utilized intellectual property rights as tools safeguarding their ICH. Due to this development, Operational Directives were amended. In order to foster sustainable development, State Parties are now encouraged to introduce IP mechanisms to protect the cultural heritage. IP Rights are hence not contrary to the UNESCO Convention. IP rights as proprietary rights can, however, be harmful to ICH if not carefully implemented. The risk is that IP rights benefit only a few members of the bearer community and therefore may create frictions within the community - also risking the vitality of ICH. So, are IP rights good safeguarding measures for the ICH?

1. How have bearer communities benefitted from understanding and using different kinds of intellectual property rights, including *sui generis* rights in safeguarding their ICH?

**Alexander PARRA PEÑA** highlighted that it is important to understand the benefit of intellectual property protection in the context of ICH. For instance, he has been running a program (for an organization called "Artesanías de Colombia") in Colombia, which has focused on intellectual property protection for traditional Colombian handicrafts. The program has managed to bring artisans closer to the tools available through IP protection. In Colombia, trademarks and collective trademarks have been used to guarantee the protection of handicrafts. Also, some protection of industrial design and protection of designated origin (PDOs) have been utilized. Even copyright protection can be used to protect handicrafts. Copyright is free for everyone to register in Colombia and for example, 'applied craft' can be eligible for copyright protection. When it comes to *sui generis* protection of ICH, no *sui generis* legislation exists as of today in Colombia.

**PARRA PEÑA** gave one more example to point out the urgent need of protecting ICH. *El Pasto de Barniz o Mopa Mopa* is a very known traditional handicraft technique from Colombia, and it has been granted a PDO ten years ago. Last year, el Pasto de

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Barniz o Mopa Mopa was even inscribed to the UNESCO list of Intangible Cultural Heritage in Need of Urgent Safeguarding. The community is in need of urgent government aid since the number of skilled artisans is diminishing. Also, due to climate change and deforestation, the raw materials used in this type of handicrafts are becoming more difficult to acquire. So, Artesanías de Colombia has been helping the artisans in order to increase awareness about the tools of IP. The organization has been aiming to make the tools of IP more available for the artisans and thereby combat inter alia misappropriations. Some commercial intermediaries have taken into account the occurrence of misappropriations and reacted to that accordingly. The challenge is that the traditional knowledge is often not respected – and IPR tools alone are often not enough in order to protect these handicrafts in the market.

**Dr. Harriet Deacon** has been working in India with three different bearer communities. Connecting to the speech Alexander **PARRA PEÑA** gave, Dr. **DEACON** highlighted that it is incredibly important for the bearer communities to understand what their rights are. In one case, a traditional Indian dance group was included in a movie but was not attributed in the credits. Once the dancers knew they had the legal right to be attributed in the movie credits they were able to negotiate better with movie makers or other third parties. Being attributed to the audio-visual material helps the dancers to become more known and creates wider awareness about the art form in the public. Furthermore, it helps the dancers to make a living.

**Prof. Dr. Tuomas MATTILA** wanted to raise two key points related to the discussion. First of all, it has been an important realization among indigenous people that ICH is also an intangible asset, and therefore something that should be protected by available legal remedies, such as IPR's. Cultural heritage has social, political, even religious values and it even has economic value. Conceptually there are justified arguments that ICH is protected and should be protected by law. The second realization is that there are already actual remedies that can be used, for instance in IP law. This also relates to a sort of paradigm shift in thinking as historically it has been assumed that cultural heritage is something that is not protected at all and therefore is free for anyone to use in any way. In later years, people have come to realization that cultural heritage is not necessarily something that is always in the public domain, and instead the dichotomy of "privately owned" and "public domain", some elements of ICH could be seen between these two opposites, as communal or collective (i.e. neither private nor public). There are some actual remedies to use – even though these remedies might not always be optimal. It is also understandable that building awareness about the existing legal remedies requires some time since for example both trademark law and copyright law are quite abstract legal constructions.

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MATTILA's own work has been focusing on the IP protection of Sámi culture. Sámi people are indigenous people inhabiting Sápmi, which nowadays covers large parts of northern Norway, Sweden, Finland, and Russia. How have been these communities able to utilize current IP laws then? As of to date, the Sámi people have registered two trademarks to distinguish authentic Sámi handicrafts. This is an example of "positive" or "active" protection, where indigenous communities actively seek for protection by the legal system. There is another example of a more "defensive" kind of protection where a Norwegian jewellery company claimed proprietary rights into a mark similar to the Sámi symbol and thereby tried to hinder Sámi artisans from using their traditional symbol. There was a public outcry from the Sámi community and eventually, this led to the invalidation of the corporation's trademark registration by the registration authority on the basis of the public morality clause - it would have been against public morality to hinder Sámi people from access to their traditional cultural symbols.

#### 2-A) What have been the challenges in adopting the proprietary rights in cultural heritage? How have these challenges been addressed?

Prof. Dr. Tuomas MATTILA started by pointing out that progress has been made in raising awareness about the legal protection of ICH. The idea of protecting ICH has, by analogy, similarities to the *ratio legis* and logic of IP laws. If one looks carefully, the ICH expressions are products of human intellect and creativity, often produced in over-generational processes, and in this sense similar to copyright protected works. Designs and symbols can also be used in distinguishing certain origins or communities, and there is a similarity to IP protection and purpose of trademarks.

Challenges occur in using the protection. If ICH is protected by trademark or a copyright, it must be then perceived as an object of IP right. This requires legal definitions which might be difficult to achieve. Traditional designs often evolve and defining them might be difficult. And also, introducing a definition in a fixed form might pose some risks for the development of the culture in the future.

MATTILA also pointed out the challenges of bringing these legal concepts into bearer communities. When a propriety right is introduced, it must have an owner. However, ownership structures are quite different in the indigenous communities than what our legal system assumes, and also the concepts of e.g. ownership and property might have different meanings. As a solution, Mattila proposed that the authorities take the time to listen what is the desired outcome from the perspective of the indigenous community - then it is possible to match the legal protection with the indigenous traditions and culture.

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2-B) How have alternative strategies or cumulative remedies been applied, such as ethical codes or consumer boycotts?

Alexander PARRA PEÑA continued with another example. In this case, the action was not only taken by the consumers but also by the artisans themselves. It also serves as an important example where it can be shown that the IP protection of handicrafts works in practice. This case occurred eight years ago to the indigenous community producing a traditional Colombian hat, ("Sombrero vueltiao", which is a Colombian cultural symbol and known even internationally). In Colombian tourist markets, counterfeits of "sombreros vueltiaos were being sold (these were unauthorized copies, made in China). The Artesanías de Colombia approached several authorities, including the Colombian IP office, showing that the artisans had the rights to the traditional hats (there was a registered collective trademark "Sombrero Vueltiao" and also, some video material was used as evidence). The Colombian IP Office ordered, as a preventive measure the suspension of production, marketing, and sale of hats that imitate, or seems to be, or represents or resembles a hat shown in the video material. Also, consumer laws may provide protection and tackle the "freeride problem" associated with counterfeits. Following that, the Colombian authorities also ordered border measures, which stopped the containers arriving from China (containing counterfeited hats). 70 000 unauthorized copies were destroyed. Campaigns are driven (directed to consumers) in order to increase awareness about how original products can be identified.

3. How can IP rights strategies be better integrated into safeguarding cultural heritage and raising awareness and/or promotional strategies, especially when bearer communities aim to use their intangible cultural heritage for sustainable economic development, for example through tourism or product sales?

Dr. Harriet DEACON realized in the HIPAMS project in India (on heritage-sensitive marketing and intellectual property strategies) that it was actually difficult to integrate considerations around safeguarding ICH on the one hand, and on the other hand establishing IP protection or promotion and marketing of cultural products. A lot of the resources that existed for communities were either on ICH safeguarding or IP protection or marketing cultural products, but not on how to combine these approaches: *"How does it look when ICH, IP protection, and marketing strategies work all together?"* Hence, they worked with three communities in India to try to develop some HIPAMS strategies for marketing their own products (which were already placed on the market) in a heritage-sensitive way. This is particularly important because there are actual risks to putting cultural products on the market, going beyond risks of misappropriation in the market context to include decontextualization of the heritage. It is often difficult for communities to take a

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problem to court because legal advice is expensive, and the bearer communities do not always know their rights. One of the strategies was the development of ethical codes based on the Intangible Heritage Convention Ethical Principles, which helped to educate artists about their own rights. The ethical codes were useful in the negotiation between artists and consumers and raised the status of artists.

The HIPAMS project in India looked for problems and solutions across four dimensions: (1) Community governance and empowerment - how communities want to organize themselves, what is their knowledge about their rights; (2) Heritage Skills Repertoire - What are the skills or knowledge they want to protect?; (3) Reputation - how is the cultural heritage valued both within the community and outside it?; and finally, (4) Heritage sensitive innovation, how can it change over time but still be considered part of the heritage?.

The Q&A session addressed, *inter alia*, will we see in the future that the code of ethics and guidelines will start to affect the case law related to ICH. Tuomas **MATTILA** highlighted the importance of putting the needs of the indigenous community first and suggested to review how IP laws could be adjusted to more answer to collective needs, such as collective trademarks. Dr. **DEACON** also pointed out that IP law does contain opportunities to protect ICH - such as the public policy exception in trademark law. Question was also raised, whether or not IP issues concerning ICH should be connected to wider debates about the impact of commercialization on ICH. Lively debate was also centring around the free trade agreements and protection of ICH, especially in the new continental free trade area in Africa. There are provisions in FTAs that can harmonise the protection of cultural heritage. However, misappropriations by third parties in other countries not covered by such FTAs might remain a problem. Legal protections might create constraints for the ICH or actually enhance it.

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### CONCLUSION

Prof. **Benedetta UBERTAZZI** concluded that this 13<sup>th</sup> Digital Encounter has aimed to contribute to the ongoing debate surrounding the relationship between IP rights and ICH, and to engage on the positive aspect of adopting IP rights in the context of ICH. Like any protective legal mechanism, when IP rights are not carefully adopted and are not applied in a manner consistent with UNESCO's ethical principles for safeguarding ICH, they are not beneficial and can be actively damaging to ICH. Such cases demonstrate that the adoption of IP rights on ICH is not an easy task, and the strategies to effectively safeguard ICH in a sustainable manner must be devised carefully. However, IP rights may support the sustainable development of the living heritage to which they are associated as ICH safeguarding measures. IP rights can provide both positive and defensive protection for the ICH. Positive protection involves communities registering IP rights on their own ICH to achieve the desire for protection. To achieve positive protection of ICH through IP rights, the correct IP rights must be selected to provide the type of protection the bearer community desires. Additionally, the implementation of IP rights must be drafted with full community participation. Defensive protection engages communities defending their ICH through IP rights that infringe their ICH, as their legal rights, complementary to IP rights, such as image personality rights. Even boycotting strategies can also be implemented to provide defensive protection for ICH practicing community.

Eetu Huhta  
Florence Byrd