

Library Copyright Alliance
Issue Brief
Traditional Cultural Expression

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The international community has been engaged for over four decades in discussions concerning copyright and other legal protection of traditional cultural expressions (TCEs). Traditional and indigenous communities have long sought respect and recognition for their creative expressions ranging from stories, myths, folk tales, songs and music, to symbols, designs, paintings, sculptures, carvings, handicrafts, dances, and rituals. Existing international and national legal systems are not typically compatible with indigenous culture and law, and they do not sufficiently address the concerns of indigenous peoples for protection of their creative heritage.

There is no international mandate for protection of TCEs, and there is great variation in the level of protection for indigenous and traditional works in national laws. There is still a lack of consensus internationally about the type of protection that would best apply universally to traditional works. The issue has taken on new dimensions since the World Intellectual Property Organization (WIPO) established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) that began working in 2001 toward a solution to the protection of TCEs, also referred to as expressions of folklore.

Because libraries play a primary role in preserving and providing access to the world's cultural heritage, we need to be informed about this complex and evolving issue. Librarians need to understand the unique concerns surrounding traditional cultural expression both from a policy perspective and as a practical issue, for handling collections of traditional works. TCEs have practical significance for people in all parts of the world.

The American Library Association convened a working conference in November 2008 to bring together members of the library and cultural heritage communities to clarify key issues for a statement of principles to guide libraries in collecting, making available, and preserving works of TCE, and to frame positions representing the U.S. library community in international discussions. A draft Statement of Principles, entitled *Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect*, is currently available for comment at ALA's website devoted to Traditional Cultural Expression and Libraries, at <http://wo.ala.org/tce/>.

What Is Traditional Cultural Expression?

The term *traditional cultural expression* is used by the international legal community to refer to works of indigenous peoples and traditional communities, but the term does not have a precise definition. Because of the difficulty in imposing a single definition of traditional cultural expression, it has become the practice to refer to characteristics and general criteria of TCEs and

to provide non-exclusive lists of the types of works and expressions they embrace. The criterion of self-identification among traditional communities is an important principle guiding the understanding of unique works and expressions across diverse cultures. There is no single definition that embraces all forms and manifestations of traditional cultural expression.

The term TCEs is sometimes interchangeable with *expressions of folklore*. The term *folklore* was used in early discussions, but was replaced by the broader and more neutral term TCE in the international arena. Some nations, however, still prefer the term *folklore* or *folk works*, and use these terms in national copyright legislation.

TCEs are tangible and intangible forms in which traditional culture and knowledge are expressed, communicated, appear, or are manifested. They include:

- Verbal expressions or symbols (stories, epics, legends, tales, poetry, riddles, etc.)
- Musical expressions (songs, instrumental music)
- Expressions by action (dances, plays, ceremonies, rituals, other performances)
- Tangible expressions (drawings, designs, paintings, including body painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes, musical instruments)
- Intangible expressions reflecting traditional thought forms
- Architectural forms

TCEs are they often handed down from one generation to another. They reflect a community's cultural and social identity and consist of characteristic elements of a community's heritage. They are often made by authors who are unknown or unidentified, or by communities or individuals recognized as having the right, responsibility or permission to create them in accordance with the customary law and practices of that community. TCEs are often evolving, developing, and being recreated within source communities.

It is important to note that in the 1990s areas of dispute related to TCEs emerged as a result of the globalization process. In discussions of intellectual property, *traditional knowledge*, *genetic resources*, and *traditional names and designations* are separate areas of discussion. *Traditional knowledge*, also lacking a single definition, refers to knowledge of the natural and spiritual worlds, spanning what is categorized in the west under agricultural, environmental, medical and health sciences, philosophy, religion, and other specialized disciplines. Traditional knowledge and TCEs often overlap, as a reflection of the highly integrated and holistic approach to natural and spiritual phenomena in indigenous culture. *Genetic resources* refer to genetic material—material of plant, animal, microbial, or other origin “containing functional units of heredity.” *Traditional names and designations* refer to the appropriation of indigenous words in non-indigenous contexts, often to sell products.

Traditional Cultural Expressions and Copyright

Traditional and indigenous communities have long sought recognition and respect for their traditions and expressions that are a part of living culture, reflecting a community's history, cultural and social identity, and values. Central to the challenge of intellectual property protection is the need for recognition of the values of indigenous peoples and acceptance of philosophies and world views that are inseparable from a larger spiritual dimension. This is closely tied to issues of political and cultural sovereignty, a relationship to ancestral land, and cultural authority over indigenous expression and objects.

Indigenous peoples seek respect for of their traditions and cultures, and for customary laws and protocols that govern use of their creations. They seek protection of their expressions to prevent moral, cultural, and economic misappropriation, and also so that they might benefit economically from the value of their creative intellectual activity, in the same way that authors benefit from works through the copyright system.

The creative expressions of native or indigenous peoples are deeply connected to a community's spiritual beliefs, cultural identity, world view, and customary law. They are considered by native peoples to belong to the community in which they originate, and are integral to self-determination. Indigenous peoples have concerns for the spiritual care of objects and expressions and the contexts in which their works are used. Expressions are often considered sacred, not to be shared outside the community.

To the western mind, and to those outside indigenous communities, indigenous works have often been regarded as belonging to the public domain, because they originated in centuries-old traditions, having no specific source or author. It has been common for researchers, artists, musicians and entrepreneurs to ignore the origins of traditional works and expressions and to use them, sometimes consciously and sometimes subconsciously, for profit or for artistic flair and depth. Traditional material is often used without consulting with indigenous groups, without researching the context of the works, without providing attribution for the works, without acknowledging the customary laws within the communities or tribes that exist to govern use of works, and when there is a commercial purpose, without sharing the benefits of the derivative products with indigenous peoples.

A major challenge to the protection of TCEs stems from the fact that the copyright system, grounded in a western Eurocentric worldview that places emphasis on individuality and on material aspects of property, does not easily extend to many types of traditional and indigenous creations. For a number of reasons traditional copyright protection is not well suited to TCEs as works or expressions that are traditionally unpublished, often not fixed in tangible medium, created not by one individual known author but collectively, and created not on a certain date but over time. The WIPO IGC has been working since 2001 toward possible *sui generis* protection of TCE, a special kind of protection for these works that fall outside the framework of the existing copyright system, because the copyright system does not apply well to the protection of TCEs.

Specific challenges to copyright protection under the existing copyright system cover a range of issues. Many national laws require *fixation* in tangible medium of expression as a prerequisite to copyright protection. In these countries there is no means under copyright law to protect works such as oral narratives, dances, rituals, or sacred wisdom that is purposely not written down but passed down through memory from generation to generation. In addition, a general international principle of copyright is that a work must be original in order obtain copyright protection. This means that the work must constitute an author's own intellectual creation. Because so much of TCE is built upon tradition, and is the work of a collective voice that has evolved over time, questions arise as to how the *originality* requirement could be met within the existing copyright system.

Copyright law is based on the idea of original *authorship*. Copyright terms in most countries are based on life of an author. Although most national laws recognize anonymous works, the rules for protecting anonymous works are not well suited to protection of TCEs. Furthermore, collective cultural expressions that have developed over time do not fit the concept of jointly authored works in the copyright system. The question of *ownership* also arises. Copyright can protect

groups of creators, but it is necessary to identify the creators or holder of responsibility for the works. The idea of collective responsibility in indigenous culture does not precisely correspond to the concept of ownership in the copyright system. The rights granted for TCEs need to be managed by communities or by individuals. Recognition of *collective rights* for a community would need to be based on its values.

Copyright terms in most countries today are based on the lifespan of an author. Establishing copyrights term for works of indigenous and traditional communities require a different approach. Also, in the copyright context *public domain* refers to works that are available for use by the general public either because they do not qualify for copyright or because their terms have expired, or perhaps because they have been dedicated to the public domain by the author. The concept of public domain as a construct of the intellectual property system does not easily embrace the concept of privacy and restricted knowledge within indigenous communities. Finally, *geographical boundaries* present a challenge in that the copyright system is nation-centric and TCEs are not. Often TCEs are common to indigenous communities spanning many countries.

In 1967 the international community attempted to establish a form of optional protection for works of folklore for adoption in national legislation of Berne member nations. The Berne Convention was amended to add Article 15(4), which provides protection to unpublished expressions by unknown authors who are presumed to be nationals of a given country. The provision was an attempt to include traditional cultural expression, then referred to as folklore, within the scope of the Berne Convention, but it has proven difficult to implement in practice.¹

Traditional Cultural Expression: Context and Timeline

Questions of cultural autonomy are rooted in the effects of colonization on the societies and cultures of native peoples. It was not until the era of decolonization that an international effort began to address the rights of indigenous peoples. Within a framework of human rights, efforts began with the International Labor Organization (ILO) *Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* in 1957. The convention was revised and replaced in 1989 by ILO *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries*, eliminating the assimilationist approach of the earlier convention and instead emphasizing the need for recognizing the aspirations of indigenous peoples to exercise control over their institutions, ways of life, and economic development, and to maintain their identities, languages, and religions.

Since the 1960s the international community has tried to find a solution to the issue of copyright and other legal protection of traditional cultural heritage. The United Nations began to address this issue in the early 1970s, and to consider options for protection, ranging from the customary law of indigenous peoples, to guidelines and recommendations, national laws, regional agreements, protection within the multilateral copyright system, or under a *sui generis*, or special type of protection, that would be compatible to the nature of TCEs.

Indigenous communities in many parts of the world, including the U.S., are sovereign governments with their own complex legal systems. Customary laws and protocols have existed for centuries to govern all aspects of life and culture within indigenous communities. Indigenous and native legal systems hold the key to approaches that will ensure the proper respect for rights over cultural heritage. Even in parts of the world where indigenous and native peoples do not

have political autonomy, customary laws and cultural practices exist that provide for the proper care of native heritage.

Recommendations, guidelines, codes of ethics, and best practices have been developed by indigenous communities, and by non-indigenous groups and professional organizations. The *Protocols for Native American Archival Materials* (<http://www2.nau.edu/libnap-p/index.html>) developed by the First Archivists' Circle, the *Code of Ethics and Code of Practice of the Australian Institute for Conservation of Cultural Material* (AICCM), (<http://www.aiccm.org.au/docs/AICCMBusinessDocs/CodePracticeEthics.pdf>) and the Code of Ethics of the Pacific Islands Museums Association (PIMA) (http://pima.museum/pimas_code_ethics) are examples of respectful guidelines for the handling and care of TCEs.

At the national level protection for TCEs is uneven. Some nations explicitly protect TCEs or expressions of folklore, while others do not, and still others do not specify. In June 2001 WIPO issued to Member States a *Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore* (WIPO/GRTKF/IC/2/7) (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1808). Based on responses from sixty-four states, conclusions were summarized in 2002 in the *Final Report on National Experiences with the Legal Protection of Expressions of Folklore* (WIPO/GRTKF/IC/3/10) (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2055) that indicated great variation across national laws. The U.S. responded that it provides legal protection through national laws intended to protect and preserve cultural heritage and also to prevent false association of commercial goods or services with indigenous peoples. They include the Indian Arts and Crafts Act, and copyright and trademark laws.²

Regional agreements provide another option for culturally responsive norms addressing protection of TCEs. For example, the Bangui Agreement (OAPI Convention, 1982, rev. 1999) (http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf) deals with treatment of folklore. The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) (http://www.wipo.int/export/sites/www/tk/en/laws/pdf/spc_framework.pdf) establishes a model for protection for traditional owners of folklore to be implemented in Pacific Island countries.

Longstanding efforts have been made at the international level to seek solutions for protection traditional cultural heritage. Among the major efforts are the following:

Major International Efforts toward Protection of Traditional Cultural Expression

<p>Article 15(4) of Berne Convention (1967) http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P192_37445</p>	<p>In 1967 the Berne Convention was amended to introduce optional copyright protection for folklore at the national level, in Article 15(4). The provision has been difficult to implement in practice.</p>
<p>Tunis Model Law on Copyright for Developing Countries (1976) http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html</p>	<p>In 1976 the model law was adopted by a committee convened by the Tunisian government with the assistance of WIPO and UNESCO. It provides special type of protection for works of national folklore, does not require fixation, and provides unlimited protection.</p>
<p>WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore</p>	<p>In 1982 were adopted by WIPO and UNESCO and have been used as a basis for</p>

Against Illicit Exploitation and other Prejudicial Actions (1982) http://portal.unesco.org/culture/en/ev.php-URL_ID=30978&URL_DO=DO_TOPIC&URL_SECTION=201.html	provisions for the protection of folklore in some national copyright laws.
Draft international treaty (1982-1985)	From 1982-1985 WIPO and UNESCO held discussions concerning the possibility of a treaty to provide international protection of folklore. In the end the effort was determined to be premature.
WIPO Performances and Phonograms Treaty (1996) http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html	The WIPO Performances and Phonograms Treaty Mandates international protection for performances of “expressions of folklore” for nations that adhere to the treaty. Currently 68 nations are members of this treaty.
WIPO-UNESCO World Forum on the Protection of Folklore (1997) http://www.wipo.int/meetings/en/details.jsp?meeting_id=3074	In 1997 WIPO and UNESCO held a world forum to discuss the needs and issues related to IP and folklore. Participants agreed on the need for a new international standard for the legal protection of folklore and proposed regional consultations as a possible next step.
WIPO fact-finding missions (1998-1999) http://www.wipo.int/tk/en/tk/ffm/report/final/index.html	In 1998 and 1999 WIPO conducted fact-finding missions to identify IP needs and expectations of holders of traditional knowledge, including TCEs. They visited 28 countries, and consulted with over 3,000 people.
WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore (1999)	In 1999 four regional consultations were conducted to identify issues in African, Asian and Pacific region, and Latin American and Caribbean countries. There was a unanimous conclusion that future work should include development of an effective regime for protection of folklore.
WIPO Final Report on National Experiences with the Legal Protection of Expressions of Folklore (2002) http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2055	In 2001 WIPO conducted an international study on legal protection of expressions of folklore at the national level, and received responses from 64 states. The survey showed that protections vary widely and that copyright law is difficult to apply to protection of folklore in many countries.
United Nations <i>Declaration on the Rights of Indigenous Peoples</i> (2007) http://www.un.org/esa/socdev/unpfii/en/declaration.html	Adoption of the U.N. Declaration on the Rights of Indigenous Peoples in 2007 highlighted the need to find legal approaches that fall outside the framework of the Berne Convention.
WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources,	The WIPO IGC was formed in 2000, and has been working since 2001 to defining the

<p>Traditional Knowledge and Folklore (IGC) efforts toward legal protection of Traditional Cultural Expressions (2001-) http://www.wipo.int/tk/en/igc/</p>	<p>issues and options for possible legal protections for traditional knowledge and expressions, as indigenous groups continue to advocate for protection at the national and international levels.</p>
<p>WIPO Creative Heritage Project (2008-) http://www.wipo.int/tk/en/folklore/culturalheritage</p>	<p>WIPO launched the Creative Heritage Project to develop best practices and guidelines for managing intellectual property issues when recording, digitizing, and disseminating cultural heritage.</p>

Traditional Cultural Expression and Libraries

Librarians share a philosophy and a set of values that guides the profession. Library values are based on the ideas of intellectual freedom, freedom of speech, access to knowledge, preservation of knowledge and cultural heritage, and advancement of research, scholarship, education, and culture. The Core Values of Librarianship (<http://www.ala.org/ala/aboutala/offices/oif/statementspols/corevaluesstatement/corevalues.cfm>) established by the American Library Association include the concepts of access, confidentiality/privacy, democracy, diversity, education and lifelong learning, intellectual freedom, preservation, the public good, professionalism, service, and social responsibility.

In addressing the issues of TCEs, libraries need to take an approach to TCEs that will honor their creators and those for whom they constitute living culture, a source of power and of life itself, and that will balance library values with those of tradition bearers. Libraries hold collections that include TCEs—texts, manuscripts, audiovisual works, sound recordings, art, photographs, handiwork, crafts, artifacts, and archeological remains. They also hold derivative works from TCEs, such as collections of native folk tales, compilations of native wisdom, and archives of anthropological research related to native history and culture. In taking an approach to collections that is appropriate to the nature of TCEs and to the values of indigenous peoples, libraries will uphold their social responsibility and ethical obligations in accordance with established library values.

Libraries play a primary role in identifying, recording, conserving, preserving, and providing access to cultural heritage. Within a legal and cultural policy framework, libraries can play a positive role in the preservation and use of indigenous works. In respecting the rights of indigenous peoples, libraries can contribute toward the greater social good that results from preservation of cultural heritage, promotion of cultural diversity, and cultural development. Digitization is a driving force for addressing issues related to TCEs. While new technologies present great opportunities for communities to document and preserve their cultural heritage for future generations, concerns are greatly magnified by the digital environment. Cultivating library practices for managing and protecting culturally sensitive material that involve collaborative curation with indigenous communities will encourage knowledge and respect for tradition.

Libraries are taking part in initiatives that implement responsible practices for documenting and digitizing expressions of traditional cultures. The Omaha Indian Music Recordings Project (<http://memory.loc.gov/ammem/omhhtml/omhhome.html>) conducted by the American Folklife Center, Library of Congress in collaboration with members of native communities, involved the preservation of wax cylinder recordings, songs, speeches, interviews, photographs, and other

material related to the Omaha tribe, as part of the American Memory Project. The Plateau Peoples' Web Portal and Digital Archive (<http://libarts.wsu.edu/plateaucenter/portalproject/desc.html>) is being constructed collaboratively by the Plateau Center for American Indian Studies at Washington State University and Tribal consultants from the Umatilla, Coeur d'Alene and Yakama nations. These are just two examples of success in forging new models for preservation of and access to indigenous collections in libraries and archives through the culturally responsible stewardship of TCEs.

Current efforts being made by the American Library Association to adopt a Statement of Principles³ to establish frameworks designed to encourage reciprocity and collaboration in the stewardship of cultural heritage collections are a positive step toward realizing access to knowledge that embraces equally the values of the creators of traditional cultural expressions and of those who seek knowledge from those creations.

1. Article 15(4) of the Berne Convention states:

- (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.
- (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

2. World Intellectual Property Organization, *Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of the United States of America*, <http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/usa.pdf>.

3. The draft principles, entitled *Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect*, are available at <http://www.wo.ala.org/tce/wp-content/uploads/2009/06/TCE-Draft-June-10-09.pdf>.