



Seeking tangible benefits from linking culture, development and intellectual property

Wend B. Wendland

Seeking tangible benefits from linking culture, development and intellectual property

An interim report on WIPO's cultural documentation training programme for a Maasai community and the National Museums of Kenya

● **Wend B. Wendland**

Head of the Traditional Creativity, Cultural Expressions and Cultural Heritage Section, WIPO, Geneva, Switzerland

ABSTRACT

Culture is a tool for development as well as part of the process of development. Taking this proposition as its starting point, WIPO's Creative Heritage Project provides practical training to local communities and museums and archives in developing countries on recording, digitising and disseminating their creative cultural expressions and in managing IP issues.

In partnership with the American Folklife Center/Library of Congress and the Center for Documentary Studies at Duke University, WIPO ran a pilot training programme for the Maasai community of Laikipia, Kenya and the National Museums of Kenya in September 2008. The intensive, hands-on curriculum included project planning, research ethics, photography, sound and audio-visual recording techniques, digital archiving methods and database and website development. In cooperation with the US Copyright Office, WIPO staff provided the IP component of the training. WIPO will purchase a basic kit of recording equipment and knowledge management software for the community, help the community and museum to develop

their own IP protocols, continue to foster a mutually-beneficial working relationship between the community and the museum and further develop links established between the community, the museum and the national IP offices in Kenya. Lying at the interface between the safeguarding of living heritage and its legal protection, the programme seeks to advance a range of valuable policy goals - promoting cultural diversity, fostering economic development, using culture as a communications tool in development, bridging the 'digital divide', promoting responsible tourism and creating local cultural content. Early results from evaluation of the pilot are encouraging, and WIPO and its partners have received several requests from other communities and museums and archives to participate in such a programme. However, something so ambitious presents many challenges and it remains an unpredictable cultural and legal experiment. This article will describe how and why the programme was conceived, its various objectives, the challenges, expected results and lessons learned so far.

Introduction

The World Intellectual Property Organisation (WIPO) has recently launched a pilot programme to assist indigenous communities to document their own cultural traditions and safeguard their intellectual property (IP) interests in

authorising the use of their documentation by third parties.

New technologies provide communities with fresh opportunities to document and digitise expressions of their traditional cultures. This can meet the strong

desire of communities to preserve, promote and pass on their cultural heritage to succeeding generations. Yet these new forms of documentation and digitisation can leave this cultural heritage vulnerable to unwanted exploitation beyond the immediate community. The WIPO training programme recognises both the usefulness of technology for indigenous communities and the paramount need to empower communities to make informed decisions about how to manage IP issues in a way that corresponds with community values and development goals.

The pilot programme began in September 2008, when two members of a Maasai community from Laikipia, Kenya and an expert from the National Museums of Kenya travelled to the American Folklife Center (AFC) and then to the Center for Documentary Studies (CDS) in the United States of America for intensive, hands-on training in the documentary techniques and archival skills necessary for effective community-based cultural conservation. WIPO staff provided relevant IP training. WIPO will also provide the Maasai community with a basic kit of field equipment, a computer and software for their own use. The pilot programme is a collaboration between WIPO and the AFC at the Library of Congress in Washington D.C. and the CDS at Duke University in North Carolina.

This innovative capacity-building partnership with the Maasai community of Laikipia addresses a pressing yet legally and practically complex question – how can indigenous and local communities record and disseminate their traditional cultural expressions without ceding authority over how those recordings are used by third parties? The goal of the programme is to empower tradition-bearers to preserve and pass on their own traditional cultures, if they wish to do so, while safeguarding their IP interests. The results of the pilot

will be shared with other indigenous communities and, depending on the feedback, WIPO and its partners could envisage offering similar programmes to other communities and to museums, libraries and archives from other countries.

The training programme enables the Maasai to acquire the requisite technical skills and equipment so they can themselves record their own cultural traditions. The National Museums of Kenya, which also participated in the programme, will be available to provide ongoing institutional support. The Maasai community and the National Museums of Kenya have participated directly as partners in evaluating this pilot initiative and together will make recommendations for its improvement and further development.

This programme tests a number of complex and controversial assertions in a very practical context. This article describes how it all began, and its main features, including the intellectual property dimension and how the programme aligns with other WIPO activities and projects. The article seeks to initiate reflection on the possible impact of such a programme and on the policy, legal, logistical and other challenges it faces. As an interim report, this article acknowledges that its intended and unintended consequences are not likely to be known for some years.

Origins of the programme

This pilot programme stems from a request received by WIPO from the Maasai community, semi-nomadic pastoralists located in the Laikipia area of northern Kenya. In a submission to WIPO in April 2006,¹ the community wrote that although the Maasai are one of the most researched ethnic groups in Kenya, they *remain among the most misunderstood and misinterpreted...*

The community stated that its cultural expressions, traditional occupations and livelihoods were at risk due to inappropriate policies and practices that were *destroying the wealth of skills, heritage, livelihood practices and cultures that has been built over years.*

Of particular interest to WIPO was that the perceived threats to the community's culture included the exploitation of cultural resources, the patenting of traditional knowledge and the commercialisation of Maasai culture without the prior and informed consent of, and benefit-sharing with, the community. As the written submission eloquently put it, *the disintegration, assimilation and erosion of cultures particularly in Africa, have transformed communities into spectators rather than rights holders.*

In order to combat what it sees as cultural erosion and piracy, the community advised WIPO that it had established a corporate entity, the Maasai Cultural Heritage Foundation (MCH), to spearhead a collaborative process in which the community would be empowered to document its own cultural traditions and creative expressions. It wished to do so in order to safeguard these traditions and expressions, protect them against unauthorised use, promote Maasai culture, derive economic benefit and use Maasai cultural expressions in teaching, conflict mitigation, conflict resolution and awareness-raising on issues such as HIV/AIDS.

The community set out its objectives clearly (this is quoted verbatim from the submission):

- a) To preserve, protect and promote Maasai culture through cultural education and cultural talks.*
- b) Promote recognition of and respect for Maasai indigenous people's culture by designing a website and posting all cultural information.*
- c) Promote tolerance and understanding of the cultural, spiritual and language diversity through recording traditional songs and information dissemination.*
- d) Enhance sustainable economic development drawing on the wealth of knowledge and experience of the Maasai culture to advocate against corruption and protect human rights.*
- e) To use the traditional songs to raise community awareness and education on productive health and HIV/Aids.*
- f) Establish a cultural museum and documentation centre for the storage and preservation of the cultural*

artefacts and community research and database.

g) Enhance and uplift the economy of the Maasai people through livelihood support programmes, and encourage the advancement of their cultural practices that forms the backbone of their economy.

h) Create awareness of the rich culture to the policymakers and lobby for the participation of the community in the policy making/formulation processes at the national level.

It seemed that the community's submission implicitly recognised that culture, as a manifestation of a people's identity, is creative, dynamic and forward-looking. As such, culture exists as a fundamental component of sustainable economic, social and cultural development. The community sees its culture not only as a tool for development but also as part of the process of development. In approaching WIPO, the community also seemed to recognise that balanced and strategic use of IP rights can bolster culture's place at the centre of development.

WIPO reacted positively to the community's request for assistance. At its invitation, WIPO first made an exploratory visit to the community in late 2006, together with the International Labor Office in Geneva (ILO), which is working with the same community on human rights and local economic development. The community lives on the Il Ngwesi group ranch which is located some seven hours by four-wheel drive from Nairobi. The group ranch is owned by the community. The community also owns and manages the award-winning Il Ngwesi Lodge.

This first visit was crucial as it enabled a certain level of trust and cooperation between WIPO and the community to be established. It was, and remains, key that this development project be soundly based on the principle of free, prior and informed consent (FPIC). WIPO provided some initial IP training, and time was spent in laying out options for decision by the elders and other members of the community. The consultation took place over three full days under a large tree at the community's *manyatta* (village); both men and women participated. WIPO's visit to Kenya was also used to facilitate contact between the community and key governmental agencies in Kenya, such as the Copyright Office, Kenya's Traditional Knowledge Task Force and the Kenyan Intellectual Property Institute (KIPI).

Guided by the lessons learned during this visit, WIPO recognised that the starting point – in order to really

empower the community to participate in their own development, as the community had rightly put it - should be to train the community in cultural documentation and on how to manage IP issues and options when doing so. This seemed preferable to having the community's cultural expressions documented and managed by outsiders.

As indigenous communities increasingly wish to record and represent their own cultures, and in keeping with a human rights and development-centred approach, it seems only appropriate that indigenous communities should lead and direct these recording projects, with WIPO playing a supportive and facilitatory role only.

The intellectual property dimension

The IP dimension is, theoretically at least, quite straightforward. 'Traditional' cultural expressions are often 'in the public domain' under the conventional IP system, and therefore unprotected. However, recordings of these expressions - whether in the form of photographs or sound or audiovisual recordings, for example - are new intellectual works. Very often, the person making recordings of traditional cultural expressions is a third party ethnomusicologist or anthropologist, or an institution such as a museum or archive. In such cases, the rights in the recordings are vested in the people who made them. On the other hand, when the community is in control of the making of such recordings, it is the owner of the rights in them. Ownership of the rights, in turn, empowers the community to decide if, and when, third parties may have access to the recordings and what they may do with them. The community may decide to allow free use of its

recordings, or it could decide to commercialise some of them. The point is that by having created IP rights and as the owner of those rights, the community gets to decide. Protecting recordings does not, of course, protect the underlying traditional cultural expressions embodied in them.² But in practice, having control over the recordings can be valuable, and it is preferable, from a community perspective, that the community should own such rights rather than the rights being vested in a third party.

Next steps

Following the visit, and in consultation with the community, WIPO contacted Dr. Peggy Bulger, Director of the AFC, and, based on the Center's successful history of producing Folklife Field Schools for Cultural Documentation, invited the AFC to develop a pilot training programme in cultural documentation with WIPO. AFC in turn contacted CDS, led by Dr. Tom Rankin, and AFC and CDS then together developed the curriculum for the training programme. The curriculum includes such topics as project planning, research ethics, digital archival methods, documentation techniques and database and website development and management. WIPO provides IP training, focusing in particular on copyright and related rights and the protection of traditional knowledge and traditional cultural expressions. The full programme -together with presentations made and materials handed out - will in due course be accessible on the websites of WIPO, the AFC and CDS.

Following the programme in Washington D.C. and Durham, the trainees visited WIPO in Geneva, for debriefing and evaluation. The evaluation is still ongoing. If the pilot is deemed a success, WIPO and its partners

Figure 1
John Ole Tingoi and Anne Tome Sintoyia receiving training from Chris Sims, CDS, on the use of camera equipment, CDS, September 2008
Photo: Dr. Guha Shankar, AFC/LOC



hope to offer the programme annually to indigenous communities and museums from different countries.

The community was invited by WIPO to select two members to receive the training. The community selected Mr. John Ole Tingoi and Ms. Anne Tome Sintoyia. These were excellent choices. The gender balance was valuable. Both trainees are development workers within the community, relatively young and computer literate, but not experts. They had both had some prior experience in conducting interviews with community members. They embraced the training with enthusiasm and seemed ideally placed to apply what they have learned in the community.

The role of the National Museums of Kenya

Museums, archives, libraries and other cultural repositories play an invaluable part in preserving the rich cultural heritage of our planet. Yet, over the past several decades, there has in some cases been a publicised absence of trust between indigenous communities and the museums, archives and other repositories that hold pieces of their tangible and intangible heritage.³ This absence may arise from the complex historical, cultural, legal and political conditions under which collections were established in the first place. Yet, it would benefit both indigenous communities and cultural institutions to step beyond this uneasiness. Indeed, many cultural institutions now see themselves not as the 'owners' of their collections of indigenous materials, but rather as their 'stewards' and 'custodians'. They wish to work more directly and instrumentally with indigenous communities, actively engaging with indigenous expertise to foster new, cross-cultural partnerships that could both enrich museum work and benefit indigenous communities. Management of IP issues can play a part, albeit perhaps a small part, in changing the way cultural repositories and communities see each other.

With this perspective in mind – and while deeply conscious of the sensitivity, complexity and even controversial nature of this perspective – WIPO's approach has been, as far as possible, to involve national and local museums, libraries and archives in its training programme.

WIPO accordingly invited a representative of the National Museums of Kenya, Mr. Kiprop Lagat, to join in the consultative visit to the community in October 2006 and in the training programme that took place in

September 2008. As expected, Mr. Lagat participated more as trainer than trainee, and the three Kenyan participants worked together as a team. Longer term, the community is likely to benefit considerably from the ongoing support of Mr. Lagat and his colleagues at the National Museums of Kenya.

Next steps

The training programme provided in Washington D.C., Durham and Geneva was only 'Phase One'.

During the training in Washington D.C., it emerged that the community had in the past made recordings of music and oral histories on audio cassette tapes. These tapes were not necessarily in the best of condition. The AFC kindly offered to clean and digitise these recordings, which the community could immediately archive and catalogue and make available to the public (if it so wished). In this way, the two community members could rapidly apply some of the training they had received. At the time of writing, this cleaning and digitisation process has been completed and the digitised recordings have been transmitted to the community.

Representatives of the three organisations will travel to the community in mid 2009 to complete the training programme ('Phase Two'). This visit will include a formal handover of the equipment purchased by WIPO for the community, a return of the tapes cleaned and digitised by the AFC, further on-site training provided by the AFC and CDS, and an IP workshop conducted by WIPO which will aim to assist the community in developing its own IP policy and protocols. The visit will also serve as an occasion to launch an IP handbook for the community written by Mr. Ole Tingoi with the support of WIPO.

Longer term, the National Museums of Kenya, WIPO, the AFC and CDS will remain available to provide ongoing advice and guidance to the community. Should the community so wish, it could, for example, be helped to establish a website in order to make some of its recordings available to the broader public. It may even wish to commercialise some of its recordings. However, these decisions lie exclusively with the community. The community owns the IP rights to the recordings and this empowers it to make decisions in accordance with its own developmental objectives.

The place of this training programme within WIPO's broader activities

This pilot project forms part of WIPO's Creative Heritage Project⁴, which is developing an integrated set of practical resources and guidelines for cultural institutions such as museums, libraries, archives and indigenous communities on managing IP options when digitising intangible heritage. These resources include:

- (a) a compendium for museums, libraries and archives on identifying and managing IP options, provisionally entitled *Safeguarding Intangible Cultural Heritage and Protecting Traditional Cultures: The Management of Intellectual Property Issues and Options*. Although WIPO has already published a more general guide for museums (*WIPO Guide on Managing Intellectual Property for Museums*), this complementary resource will deal more specifically with the management of IP in relation to collections of indigenous cultural materials. It will be based on surveys conducted for WIPO on the experiences of museums, libraries and archives in this area (see below);
- (b) a searchable database of existing codes, policies and practices developed by institutions and communities relating to IP and indigenous collections⁵;
- (c) surveys of museum and archival experiences with these issues in North America, France, India, Bulgaria and the Pacific.⁶

This capacity-building initiative is distinct from, but complements, efforts to develop special (*sui generis*) systems for the protection of traditional cultural expressions and knowledge, such as are being discussed in the WIPO Intergovernmental Committee on Intellectual

Property and Genetic Resources, Traditional Knowledge and Folklore.⁷

Reflections

As suggested above, the training programme builds on the notion that culture, as a manifestation of a people's identity, is creative, dynamic and forward-looking, and exists as a fundamental component of sustainable economic, social and cultural development. It seeks to make culture not only a tool for development but also part of the process of development.

Furthermore, the programme lies at the interface between the 'safeguarding' of living heritage and its 'legal protection'. The protection of IP and the safeguarding of intangible heritage have always had a somewhat uncertain and awkward relationship. This may stem in part from an inherent ambiguity in the meaning of 'protect' and a need to clarify the relationship between the *safeguarding* of cultural heritage and the *legal protection* of creativity against unauthorised use.⁸

This uncertainty appears particularly visibly in the recording and documentation of intangible heritage. Many initiatives are underway--internationally, nationally and locally--to document, record and digitise intangible heritage, and these play an invaluable role in preserving the rich cultural heritage of our planet, fostering educational opportunities and promoting respect for the cultural expressions, traditions and ways of life of the world's diverse peoples and cultural communities. However, indigenous and local communities sometimes express concerns that documentation activities do not take adequate account of their rights and interests, and that documenting and displaying an element of intangible



Figure 2
John Ole Tingoi facilitating the WIPO and ILO consultation with the community, Il Ngwesi, October 2006. Photo: Wend Wendland, WIPO

heritage—for instance, the recording of a traditional song or a tribal symbol—may make it vulnerable to intellectual misappropriation. There is particular concern over safeguarding activities for ‘traditional’ cultural expressions (or ‘folklore’) and culturally sensitive materials that may be perceived as being ‘in the public domain’ by conventional IP laws, as mentioned earlier. Indigenous and other local communities argue that they do not have adequate control over research conducted into their cultures, nor over how their cultures are recorded and presented to the public at large. The handling of secret and sacred materials held within such collections can be a particularly acute source of concern. The ethnographic collections of museums and other institutions often include invaluable, even unique, records of ancient traditions, lost languages and community histories which are integral to indigenous peoples’ identity and continuity. Yet the intellectual content of such material is often not owned by the indigenous people, but rather by the people who ‘made’ the film, sound recording, photographs or manuscript.⁹ By enabling communities to record and document their own cultural expressions, the WIPO programme described in this article seeks to vest intellectual ownership in the records in the hands of the communities, thus empowering them to decide who may have access to the records and under what conditions.

The programme may also directly, and indirectly, advance a number of other valuable policy goals, such as promoting cultural diversity, fostering economic development, bridging the ‘digital divide’, promoting responsible tourism and ‘nation branding’, and creating local cultural content.

Challenges

Yet, there are numerous logistical, political, technological and resource-based challenges associated with such an ambitious programme.

Perhaps in the interim it may be useful to catalogue some of the challenges already apparent.¹⁰ These may be classified as follows:

(a) Policy: the very premise of the programme bears constant evaluation and reflection. Are recording, documentation and digitisation the best ways to safeguard living heritage? How do such projects transform social relationships, power dynamics, cultural development and exchanges within such

communities? How does such a project – which rests upon the more conscious and strategic use of existing IP rights – interface with efforts to establish new (*sui generis*) IP systems for traditional cultural expressions and knowledge?

(b) Legal: in whom, or in which entity, would collective rights in the recordings actually be vested? How would rights in contemporary creative expressions be managed? How would collective and individual claims to rights be reconciled? Is there a role for some form of community-led collective rights agency?

(c) Logistical: who or which entity would own the equipment purchased by WIPO for the community? Where would it be stored? How would the equipment be maintained, insured and upgraded over time?

(d) Sustainability and scalability: at what point does the programme ‘end’ and the community is left to continue on its own? Can all the community’s expectations be met? How does such a narrowly focused programme complement and advance all the developmental goals of the community? How frequently can WIPO, the AFC and CDS hope to offer such a course to communities and museums/archives from other countries? What additional resources and which other partners may be needed to expand and enhance the programme so that it can reach a wider range of beneficiaries? Could the programme also be offered in an online, distance- learning format?

(e) Political and organisational: how is the community organised and who speaks for it? How are decisions taken? How do WIPO, the AFC and CDS know that the instructions they receive are credible and truly reflect the community’s wishes?

Concluding remarks

This programme is an innovative and pragmatic attempt to empower an indigenous community, in partnership with the national museum, to take decisions about which elements of its culture should be recorded, to undertake the recording itself and thereafter to manage access to the recordings. In introducing IP rights management as a useful tool, it seeks to promote both the safeguarding of intangible heritage and its legal protection. It tests a number of complex and controversial assertions in a very practical context. While the results of evaluation so far

are positive, the programme remains an unpredictable cultural and legal experiment. WIPO and its partners fully appreciate the level of ambition and complexity associated with the programme.

Evaluation is ongoing and the true value and impact of the programme will probably only be measurable longer term, and it will take time to observe and understand its foreseen and unforeseen consequences. 🇪🇺

NOTES

1. April 2006. *Maasai Cultural Heritage Foundation, Profile and Concept Paper*, copy on file with author
2. Although performances of traditional cultural expressions are protected internationally, through the WIPO Performances and Phonograms Treaty, 1996. See generally WIPO, 2003. *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, pp. 59 -71.
3. Anderson, J., 2005. *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*, the MacArthur Foundation and the American Library Association, Columbia University. Paper available at <http://correctingcourse.columbia.edu/program.html>
4. See <http://www.wipo.int/tk/en/folklore/culturalheritage/>
5. See http://www.wipo.int/tk/en/folklore/creative_heritage/index.html
6. See <http://www.wipo.int/tk/en/folklore/culturalheritage/surveys.html>
7. See <http://www.wipo.int/tk/en/igc/>; Wendland, Wend, 2008. 'It's a Small World After All - Some Reflections on Intellectual Property and Traditional Cultural Expressions', in Beat Graber, Christoph and Burri-Nenova, Mira (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, Cheltenham, UK, Edward Elgar.
8. See generally Prott, Lyndel. V., 2001. 'An International Legal Instrument for the Protection of Intangible Cultural Heritage?', in *In einem vereinten Europa dem Frieden der Welt zu dienen' Liber Amicorum Thomas Oppermann*, Claus Dieter classen et al; Sherkin, Samantha, 2001. 'A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore', in Seitel, Peter (ed.), *Safeguarding Traditional Cultures: a Global Assessment*.
9. See Anderson, Jane, *ibid*.
10. I am grateful for the discussions and communications I have had on these points with my WIPO colleague Jessyca van Weelde, with colleagues at the AFC and CDS, and with external experts such as Mat Callahan of Berne, Switzerland and Daniel Sherman of the University of Maryland, USA.