

Inventory Making and Fairy Tales Safeguarding of Intangible Cultural Heritage in an Historical Perspective

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1. INTRODUCTION

About 200 years ago, the Brothers Grimm undertook a huge effort to collect fairy tales. They invited storytellers and transcribed these oral tales. This resulted in 1812 in a collection of 86 German fairy tales in a volume titled *Kinder- und Hausmärchen*¹ (Children and Household Tales).² Two years later, another collection of 70 fairy tales followed.³ Throughout the years, their collection grew to 200 fairy tales.⁴ The Brothers Grimm, by far the best-known fairy tale collectors, were not the first to collect and publish fairy tales. In 1697, Charles Perrault published his *Histoire ou Contes de Temp passé* (Tales or Stories of the Past),⁵ which were mostly adapted versions of earlier folk tales collected by Giambattista Basile. For a long time, Basile's Neapolitan fairy tales titled *Lo cunto de li cunti overo lo trattenemiento de peccerille*

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¹ See, e.g., BRÜDER GRIMM, *KINDER- UND HAUSMÄRCHEN* [Children and Household Tales] (18th ed., 1999).

² See Heinz Rölleke, *Entstehungs- und Veröffentlichungsgeschichte der Grimmschen Märchen* [The Origin and the Publication History of the Grimm's Fairy Tales], epilogue to BRÜDER GRIMM, *supra* note 1, at 840.

³ See *id.* at 849 (mentioning that the Brothers Grimm collected a total of 156 fairy tales when they finished the two collections. Deducting the 86 first collection fairy tales from this number, one reaches a number of 70 fairy tales in the second collection).

⁴ Even though Wilhelm Grimm liked to keep the number of fairy tales at 200, a number reached in the 1857 edition, the collection of fairy tales is more extensive. Heinz Rölleke points out that some fairy tales in earlier editions were replaced, and that a list of 10 Children's Legends are counted separately from the fairy tales, even though they are a constitutive part of the last edition. Besides these 10 Children's Legends, the collection of fairy tales is supposedly 210 in total; see *id.* at 868-69. Cf. RUTH B. BOTTIGHEIMER, *GRIMMS' BAD GIRLS AND BAD BOYS: THE MORAL AND SOCIAL VISION OF THE TALES*, Preface ix (1987) (reporting the number even at 211).

⁵ See, e.g., CHARLES PERRAULT, *HISTOIRE OU CONTES DE TEMP PASSÉ* (Paul Durand ed., Editions des Deux Coqs d'Or, 1971) (1679).

(The Tale of Tales, or Entertainment for Little Ones),⁶ also known as the *Pentamerone* (1674), was the best and richest collection of folk tales.

The respective works of the Brothers Grimm, Perrault and Basile could be seen as an early example of inventorying intangible cultural heritage.⁷ A recently adopted international legal instrument in relation to safeguarding intangible cultural heritage, the *Convention for the Safeguarding of Intangible Cultural Heritage* (ICH Convention),⁸ resumes with this practice of inventory making. State Parties, according to Article 12(1) of the ICH Convention, must identify and inventory intangible cultural heritage within their territory.

This Chapter investigates the legal framework on inventory making under the ICH Convention through the lens of the Brothers Grimm, Perrault and Basile. This investigation does not attempt to critique these or any other collector of fairy tales. At the end, each deals with intangible cultural heritage within a specific time framework, with its own peculiarities. Rather, this investigation seeks to define boundaries set forth by the ICH Convention in relation to inventory making. Possible insights into the purpose of inventories, design, and administration of inventories, would endow secondary value to this Chapter.

This Chapter is divided into four sections. Section 2 points out that inventory making presupposes a systematic analysis of the object of the inventory. It is argued that any form of inventorying is impossible without a clear delineation of this object. Examination of the ICH Convention illuminates how it can help State Parties in this respect. Section 3 illustrates how the much-advocated bottom-up approach of safeguarding, emphasizing the role of communities, is conceptualized in the ICH Convention. Specifically, we highlight the requirements provided in the ICH Convention for community involvement in inventory making. Section 4 investigates whether the ICH Convention prescribes something in relation to the scope of inventory making. More precisely, this section questions whether the inventory should provide for the broader environment in which the intangible cultural heritage is embedded. Section 5 elaborates on possible intellectual property law issues generated by inventories created for safeguarding intangible cultural heritage. It explores whether the Convention is completely silent on the issue.

2. A SYSTEMATIC APPROACH TOWARDS INTANGIBLE CULTURAL HERITAGE

Private initiatives, such those of the Brothers Grimm, Perrault or Basile, led to several valuable collections of fairy tales. These collections detail fairy tales transmitted orally for generations. However, it is imprudent to outrightly view these as an inventory of intangible cultural heritage. The Brothers Grimm's collection of fairy tales found its origin in a plan of Clemens Brentano, who wanted to devote a publication to fairy tales, a much-neglected form of folklore at that time. In doing so, the publication would follow the folk song collection *Des Knaben Wunderhorn* of Clemens Brentano and Achim von Arnim, to which the Brothers

⁶ See, e.g., GIANBATTISTA BASILE, *DER PENTAMERONE* (Kurt Ranke ed., Felix Liebrecht trans., Georg Olm Verlag 1973) (1846); GIAMBATTISTA BASILE, *STORIES FROM THE PENTAMERONE* (E.F. Strange ed., John Edward Taylor trans., Macmillan 1911) (1847).

⁷ This seems especially the case for the Brothers Grimm. During his search for a publisher, Jacob Grimm pointed out that he wanted to prevent German folklore from dying out. Hence, collecting and printing fairy tales would "salvage what was left of the priceless national resources." See MARIA TATAR, *THE HARD FACTS OF THE GRIMMS' FAIRY TALES* 11 (1987).

⁸ See Convention for the Safeguarding of the Intangible Cultural Heritage, 17 Oct. 2003, U.N. Doc. MISC/2003/CLT/CH/14 (2003), available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> (last visited 31 Jul. 2008) [hereinafter "ICH Convention"].

Grimm already contributed.⁹ However, Brentano and von Arnim turned away from the planned publication of fairy tales to pursue their own individual projects. The Brothers Grimm, having already done a considerable amount of fieldwork, decided to publish this work under their name.¹⁰ A second edition soon followed the first edition of the *Kinder- und Hausmärchen*. This continued until the Brothers Grimm gradually expanded their collection to 200 fairy tales, the number of fairy tales found in their seventh, and last, edition of the *Kinder- und Hausmärchen*.¹¹

There are few criteria given by the Brothers Grimm identifying the specific collection sought, and what exists is scattered over different writings. Some appear in introductions to their fairy tale collection,¹² others are part of their other books¹³ and still others are letters to their friends.¹⁴ The Brothers Grimm had a firm concept of fairy tales, and they set legends apart from this concept. Their collection intended to comprise old stories, poetic in nature that existed in of itself,¹⁵ while legends lack this attribute for they are “historically and geographically linked narratives.”¹⁶ They further restricted their collection to the geographical area of Hesse and immediate surroundings,¹⁷ and sought orally transmitted tales.¹⁸ However it is noted, they admitted not adhering fully to this last criterion.¹⁹ Even with such specific requirements, the Brothers Grimm should have been able to find more than the 200 fairy tales they collected.²⁰ However, Wilhelm Grimm wanted to keep it fixed at 200.²¹ His desire to limit the collection shows they did not intend to engage in a systematic analysis of folkloric stories in order to deduct fairy tales and inventory them.

Likewise, Perrault and Basile lacked rigid collection standards. Neither put forward a well-defined framework explaining what kind of fairy tales they were interested in.²² Perrault’s collection of fairy tales reveals his devotion to educating his children and making folk culture part of modern France, rather than a profound study of fairy tales.²³ Basile,

⁹ See CHRISTA KAMENETSKY, *THE BROTHERS GRIMM AND THEIR CRITICS, FOLKTALES AND THE QUEST FOR MEANING* 39 (1992).

¹⁰ See *id.* at 39-40.

¹¹ See *supra* text accompanying note 4.

¹² See, e.g., BRÜDER GRIMM, *supra* note 1, at 31.

¹³ See, e.g., BRÜDER GRIMM, *DEUTSCHE SAGEN* [German Legends], Vol. I, 1-5 (Donald Ward trans., 1981) (1816).

¹⁴ See, e.g., Siegfried Neumann, *The Brothers Grimm as Collectors and Editors of German Folktales*, in *THE GREAT FAIRY TALE TRADITION: FROM STRAPAROLA AND BASILE TO THE BROTHERS GRIMM* 969, 971 n.7 (Jack Zipes ed., 2001).

¹⁵ See BRÜDER GRIMM, *supra* note 1, at 1-5. See also Jan Faye Braadland, *Echoes of the Brothers Grimm from Thule: A Short Introduction to Andreas Faye (1802-1869) and his ‘Norske Sagn’ (1833)*, in *JAHRBUCH DER BRÜDER GRIMM-GESELLSCHAFT* [Yearbook of the Brother’s Grimm Association] 7, 16 (Hartmut Kugler, Bernhard Lauer, Fritz Paul, Lutz Röhrich & Ruth Schmidt-Wiegand eds., 1995).

¹⁶ BOTTIGHEIMER, *supra* note 4, at 8.

¹⁷ See *infra* text accompanying note 44.

¹⁸ See BRÜDER GRIMM, *supra* note 1, at 31; Neumann, *supra* note 14, at 971 n.7 (arguing that the orally transmitted fairy tales have to be faithfully transcribed).

¹⁹ See KAMENETSKY, *supra* note 9, at 151-153.

²⁰ Officially, the collection consists of more than 200 fairy tales; see *THE GREAT FAIRY TALE TRADITION*, *supra* note 14, at 831.

²¹ See Rölleke, *supra* note 2, at 869 (“Diese Rundzahl wollte Wilhelm Grimm nicht mehr ausgeben...” [“Wilhelm Grimm did not want to give up this round figure anymore”] (author’s translation)). Several unpublished fairy tales indicate that there are more than the 200 or 211 fairy tales, depending on the way of counting; see GRIMMS MÄRCHEN WIE SIE NICHT IM BUCHE STEHEN [Grimm’s Fairy Tales as They are not Portrayed in the Books](Heinz Rölleke ed., 1993).

²² See *THE GREAT FAIRY TALE TRADITION*, *supra* note 14, at 839; Benedetto Croce, *The Fantastic Accomplishment of Giambattista Basile and his Tale of Tales*, in *THE GREAT FAIRY TALE TRADITION*, *supra* note 14, at 879, 880-81.

²³ See *THE GREAT FAIRY TALE TRADITION*, *supra* note 14 at 839.

writing in a period in which the *Decamerone* of Boccaccio became the classic structure for stories, imagined weaving 49 stories into one overarching story.²⁴ It is doubtful these fifty stories emerged from a systematic analysis of a predetermined subset of traditional fairy tales from Venice, Sicily and Naples.²⁵ The lack of a protocol for the definition, delimitation or identification of works sought indicates these collections represent only an embryonic form of inventory making. A proper inventory process requires prior understanding on what shall be collected.²⁶ Such decisions would allow for a systematic approach towards collecting fairy tales by the respective authors.

The ICH Convention anticipates the identification problem, something with which these early collectors obviously struggled. Before imposing on the State Parties the duty to inventory, Article 2 of the ICH Convention defines intangible cultural heritage. This article firstly categorizes practices, representations, expressions, knowledge, skills, instruments, objects, artefacts and cultural spaces (hereinafter “practices”) as intangible cultural heritage. These practices are further delineated by community identification. A community, a concept undefined by the ICH Convention, must recognize these practices as part of their cultural heritage. For the purposes of this Convention, mere recognition of a community is not sufficient. The ICH Convention necessitates community involvement towards the practices: (i) transmission of practices between generations of the same community; (ii) their recreation in ways reactive to communities’ environments, nature and history; and (iii) their centrality to community identity and continuity. Outside the scope of community issues, Article 2 also stipulates that all practices complying with these criteria are intangible cultural heritage and relevant to the ICH Convention on the condition that they are compatible with existing human rights instruments²⁷ and meet the requirements of sustainable development and mutual respect for communities.²⁸

Still, this definition is broad. Moreover, some of the defining notions, such as “community”, “human rights” or “sustainable development”, may need further clarification. Without resolving these issues, for example in the *Operational Directives*,²⁹ States may face

²⁴ See Croce, *supra* note 22, at 881.

²⁵ See *id.* at 880-81 (in his enquiry into the reasons attracting Basile to make the Pentamerone, stating that “Basile does not take the whole thing seriously, nor does he treat it as a continuous jest, because this would become insipid; but he amuses himself by presenting the popular mind, and embroiders the presentation with humour.”).

²⁶ The object of intangible cultural heritage inventory should be defined in the countries’ respective legislation which may considerably differ; cf. LYNDELL V. PROTT AND PATRICK J. O’KEEFE, *LAW AND CULTURAL HERITAGE: DISCOVERY AND EXCAVATION* 267 (1984) (stating that inventory making in relation to tangible cultural heritage may differ in various countries’ legislation which defines the object of inventory).

²⁷ See Toshiyuki Kono and Julia Cornett, *What is Intangible Cultural Heritage? An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage and the Requirement of Compatibility with Human Rights*, in *SAFEGUARDING INTANGIBLE CULTURAL HERITAGE: CHALLENGES AND APPROACHES* 143 (Janet Blake ed., 2008).

²⁸ See Toshiyuki Kono, *UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development*, in *NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE: ESSAYS IN COMMEMORATION OF THE SIXTIETH ANNIVERSARY OF UNESCO 237* (Abdulqawi A. Yusuf ed., 2007).

²⁹ The Operational Directives adopted at the Second Session of the General Assembly of the States Parties (GA) from 16-19 June 2008 do not contain this kind of definitions; see GA, *Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage*, 16-19 Jun. 2008, available at <http://www.unesco.org/culture/ich/index.php?pg=00026> (last visited 31 Jul. 2008) [hereinafter “Operational Directives”]. Operational Directives are administrative acts created to steer the Intergovernmental Committee in its decision taking under the ICH Convention, *supra* note 8; see Laurence Boisson de Chazournes, *Treaty Law-Making and Non-Treaty Law-Making: The Evolving Structure of the International Legal Order*, in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 463, 473 (Rüdiger Wolfrum and Volker Röben eds., 2005). The Operational Directives, not being a treaty, are soft law. A soft law instrument may have the advantage of being rapidly amendable; the disadvantage is its lack of bindingness. This principle would generally stand all the time, if it were not that soft law instruments very often have a dynamic interplay with

problems when setting up national inventories. This is, at least, if States want to keep working under this definition of intangible cultural heritage. The ICH Convention, having left several things to be determined by its State Parties and thus having the character of a framework agreement,³⁰ stipulates that, in case of the inventory making, a State can act “in a manner geared to its own situation.”³¹ This phrase was deliberately incorporated in the ICH Convention text to stress the sovereignty of States in identifying the intangible cultural heritage within their territory and the method for its inventorying.³² Leaving methodology to States implies autonomous determination of what intangible cultural heritage is.³³ States may add more criteria to the definition in order to limit what is inventoried. Likewise, States may decide to reduce some of the defining notions of Article 2 of the ICH Convention, such as the human rights instruments or sustainable development. This reduction can, if a State deems it necessary, be combined with the incorporation of new criteria. However, adjusting the definition will most likely affect the chance of being listed in the *Representative List of the Intangible Cultural Heritage of Humanity* (Representative List).³⁴

Having put forward what kinds of heritage a State wants to inventory that State should take the necessary information down in relation to all *a priori* defined intangible cultural heritage. The inventory should give a complete picture of the presence of intangible cultural heritage within the boundaries of that State. During the negotiation of the ICH Convention, South Africa pointed out all-encompassing inventories may require quite considerable financial resources from respective State Parties.³⁵ Cost may prohibit some State Parties from pursuing such a project. Besides, secrecy concerns of communities may also prevent inclusion of certain intangible cultural heritage. The above-described sovereignty-enforcing clause within Article 2 of the ICH Convention facilitates a realistic approach towards the inventory process. Whatever impediment exists, however, State Parties have the obligation to regularly update their inventories.³⁶ This forces State Parties to strive for complete inventories in two ways. First, the inventoried intangible cultural heritage has to be compared with the contemporary forms. Doing so recognizes the living nature such heritage. Second State Parties must strive to inventory intangible cultural heritage previously not included.

hard law. Soft law rarely stands in isolation. The Operational Directives, for example, cannot be seen separate from the ICH Convention. The former elaborates and interprets the latter. This is not done on a voluntary basis. The ICH Convention, *supra* note 8, art. 7(e), gives the competence to the Intergovernmental Committee to undertake these tasks. This explicit reference to what could be part of a soft law instrument causes the soft law instrument to have binding force. Technically speaking, the Operational Directives are still soft law in form, but they have been hardened due to their interaction with the ICH Convention, out of which they derive their authority. See Dinah Shelton, *Introduction: Law, Non-Law and the Problem of ‘Soft Law’*, in COMMITMENT AND COMPLIANCE 1, 10 (Dinah Shelton ed., 2000).

³⁰ A framework treaty is similar to any other treaty except that it provides a framework for later and more detailed treaties or national legislation. These treaties or national legislation will elaborate the principles declared in the framework treaty. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 122 (2nd ed., 2007).

³¹ ICH Convention, *supra* note 8, art. 12(1).

³² See JANET BLAKE, COMMENTARY ON THE UNESCO 2003 CONVENTION ON THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE 63 (2006).

³³ See *id.* at 63-64.

³⁴ The Operational Directives, *supra* note 29, ch. 1.2, provide the criteria for inscription in the Representative List. One of the criteria is quite obvious in regard to the definition of intangible cultural heritage, as it states that “[t]he element constitutes intangible cultural heritage as defined in Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage.” A similar criterion is stipulated for the inscription in the List of Intangible Cultural Heritage in Need for urgent Safeguarding in the Operational Directives, *supra* note 29, ch. 1.1.

³⁵ See BLAKE, *supra* note 32, at 63.

³⁶ See ICH Convention, *supra* note 8, art. 12(1).

³⁷ See THE GREAT FAIRY TALE TRADITION, *supra* note 14, at 444-73.

Hence, the obligation to make an inventory should be seen as a continuous process rather than a static act.

3. INVENTORIZATION WITH RESPECT FOR COMMUNITY'S INTERESTS

3.1. Community Recognition

The fairy tales of *Cinderella*,³⁷ *Rapunzel*,³⁸ *Hansel and Gretel*,³⁹ or *Sleeping Beauty*⁴⁰ are all well known to us. Nearly everyone links these tales directly with the Brothers Grimm. Not many of us spontaneously identify these fairy tales with Perrault, not to mention Basile. However, all these stories appear in their respective works. Perrault wrote in a French context,⁴¹ while Basile's work originated in Venice and Naples.⁴² In this context, eagerness to portray the Grimm collection as part of German culture is awkward.⁴³ Obviously, many fairy tales have diffuse histories, preventing *ownership* limited to one, specific, legally recognized geographical territory. Therefore, presenting these works only as German culture prevents a fair account of the importance from elements of other cultures and communities.

Yet, the Brothers Grimm referred to the local character of their fairy tales. Frequent allusions attest to the fact that the fairy tales are all collected and rooted in the Hessian neighborhood.⁴⁴ Praising Basile's collection of fairy tales in the third collection of their *Kinder- und Hausmärchen*, Wilhelm Grimm indicated that two-thirds of the principle incidents of the fairy tales came from Germany.⁴⁵ On one rare occasion, the Brothers Grimm marked these fairy tales as German. Contained within the second volume, the first edition (1815), the foreword to *Kinder- und Hausmärchen* had the following wording: "in these folktales lay old German Myths, which one thought were lost".⁴⁶

Commentators and critics linked the reference to local character.⁴⁷ Ernst Siecke, underscoring the German and Hessian origin of the fairy tales, assessed that these tales

³⁷ See THE GREAT FAIRY TALE TRADITION, *supra* note 14, at 444-73.

³⁸ See *id.* at 474-91.

³⁹ See *id.* at 699-716.

⁴⁰ See *id.* at 684-98.

⁴¹ For Perrault's version of the works referred to in this paragraph; see *id.* at 449 (*Cinderella*), 688 (*Sleeping Beauty*), or 704 (*Little Thumbling*), respectively.

⁴² For Basile's version of the works referred to in this paragraph; see *id.* at 445 (*The Cat Cinderella*), 475 (*Petrosinella*), 685 (*Sun, Moon, and Talia*), respectively.

⁴³ See BOTTIGHEIMER, *supra* note 4, at 14-15 (indicating through reference to Eugen Labes, Hermann Hesse and Georg Textor that a nationalistic understanding of the fairy tales was created over time and that this process continued well into the twentieth century).

⁴⁴ In the introduction to the *Kinder- und Hausmärchen* published in 1819, the Brothers Grimm wrote: "We have been collecting these fairy tales for nearly thirteen years ... in Hesse, in the regions of the Main and Kinzig of the County Hanau."; see Brothers Grimm, *Vorrede der Brüder Grimm* [Introduction by the Brothers Grimm], in KINDER- UND HAUSMÄRCHEN, *supra* note 1, at 31 ("Gesammelt haben wir an diesen Märchen seit etwa dreizehn Jahren ... nach und nach Hessen, in den Main- und Kinziggegenden der Grafschaft Hanau.") (author's translation). See also KAMENETSKY, *supra* note 9, at 120.

⁴⁵ See Croce, *supra* note 22, at 898-99; KAMENETSKY, *supra* note 9, at 146 and 150 n.59.

⁴⁶ BRÜDER GRIMM, KINDER- UND HAUSMÄRCHEN, Vol. II, VII f (1815) ("in diesen Volks-Märchen liegt lauter urdeutscher Mythos, den man für verloren gehalten") (author's translation). See also Bernhard Lauer, *Die Brüder Jacob und Wilhelm Grimm im europäischen Kontext* [The Brothers Jacob and Wilhelm Grimm in European Context], in DIE BRÜDER GRIMM UND DIE GEISTESWISSENSCHAFTEN HEUTE [The Brothers Grimm and the Current Humanities] 146, 149 (Bernhard Lauer ed., 1999).

⁴⁷ See, e.g., KAMENETSKY, *supra* note 9; BOTTIGHEIMER, *supra* note 4; TATAR, *supra* note 7; JOHN ELLIS, ONE FAIRY STORY TOO MANY: THE BROTHERS GRIMM AND THE TALES 11 (1983).

significantly sustained and strengthened German national consciousness.⁴⁸ In the same vein, but more recently, Louis Snyder contends the Brothers Grimm used their fairy tale collection primarily to create a fanatic love for their fatherland.⁴⁹ Carl Franke, taking the argument even further, noted that the fairy tales enabled the German people to realize that they carry in themselves the power to extend the civilization of old times.⁵⁰ Once represented as the very essence of “Germandom”⁵¹ differently described as “the remnants of an old faith shared by the German forefathers”,⁵² nothing could prevent an unfettered growth of a myth. It then should barely come as a surprise that the Nazi regime also reverted back to the Brothers Grimm’s collection of fairy tales for their quest for national unity.⁵³ Although the Nazis exploited the collection to justify ideological goals, it should be noted that Nazi politicians were not the only group to use the Brothers Grimm in this way.⁵⁴

The issue of the German national character of the fairy tales was also addressed outside Germany. The first English translation explicitly referred to the German character in the title. Edgar Taylor’s assuredness of the purely German origin of the collection led to his translated title, *German Popular Stories*.⁵⁵ The translated prefaces of the collections always identify surrounding regions of Hesse and Main as origins for the tales. The conclusion reached by Taylor is not so awkward. More recently, John Ellis and Jack Zipes also contend the collection was German in its nature. Both authors believe the Brothers Grimm imposed their values on the fairy tales, either by pretending that various elements were German even if they were not⁵⁶ or by recomposing the fairy tales.⁵⁷

Persistent emphasis on the German character of the Brothers Grimm’s collection of fairy tales implies that no proper reference was made to the communities out of which these fairy tales originated. Consequently, the effort of the Brothers Grimm could be perceived as running counter to what has been advocated for in the 1999 Washington Conference, titled *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture*

⁴⁸ See Ernst Siecke, *Über die Bedeutung der Grimmschen Märchen für unser Volksthum: Rede, gehalten in der Ortsgruppe Berlin des Alldeutschen Verbandes am 15. März 1895* [On the Significance of Grimm’s Folktales for our Nation: Speech held at the Berlin of the Pan-Germanic League], in SAMMLUNG GEMEINVERSTÄNDLICHER WISSENSCHAFTLICHER VORTRÄGE [Collection of Commonly Understandable Scientific Lectures] (Rudolf Virchow and Franz von Holtzendorff eds., 1896).

⁴⁹ See LOUIS L. SNYDER, *ROOTS OF GERMAN NATIONALISM* (1978).

⁵⁰ See CARL FRANKE, *DIE BRÜDER GRIMM: IHR LEBEN UND WERK* [The Brothers Grimm: Their Life and Work] (1894).

⁵¹ KAMENETSKY, *supra* note 9, at 238.

⁵² *Id.* at 239.

⁵³ See *id.* at 241-48 and 294.

⁵⁴ Emperor Wilhelm II did a great deal to revive the national folklore, including the Brothers Grimm’s *Kinder- und Hausmärchen*, for the sake of enhancing patriotism and social values. The educational theorists, Georg Herbart and Tuiscon Ziller, were given to task of implementing a folk educational program focusing on Christian ideals and conventional morality and patriotic sentiments. See, e.g., KAMENETSKY, *supra* note 9, at 236-37. In a different time, the cultural policy of the Third Reich was designed in such a way that the Brothers Grimm were depicted as the forerunners of the Nazi Regime. Such an allusion was based on a very selective reading of the Brothers Grimm’s fairy tales, leaving aside the comparative notes, erasing references to Christian legends or biblical elements, or ignoring some of the fairy tales at all; see *id.*, at 242-48. See also Christa Kamenetsky, *Folklore as a Political Tool in Nazi Germany*, 85 *JOURNAL OF AMERICAN FOLKLORE* 221-35 (1972).

⁵⁵ See JACOB GRIMM AND WILHELM GRIMM, *GERMAN POPULAR STORIES* (C. Baldwin ed., Edgar Taylor trans., Scholar Press 1971) (1823).

⁵⁶ See ELLIS, *supra* note 47, at 35.

⁵⁷ See JACK ZIPES, *THE TRIALS AND TRIBULATIONS OF LITTLE RED RIDING HOOD: VERSIONS OF THE TALE IN SOCIOCULTURAL CONTEXT* (1983); Jack Zipes, *Dreams of a Better Bourgeois Life: The Psychological Origins of the Grimms’ Tales*, in *THE BROTHERS GRIMM AND FOLKTALE* 205, 218 (James M. McGlathery et al. eds., 1988); Jack Zipes, *The Grimms and the German Obsession with Fairy Tales*, in *FAIRY TALES AND SOCIETY: ILLUSION, ALLUSION AND PARADIGM* 272, 280-82 (Ruth B. Bottigheimer ed., 1986).

and Folklore: Local Empowerment and International Cooperation. This conference, jointly organized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Smithsonian Institution, concluded that effective safeguarding requires both the community and the intangible cultural heritage to be considered important.⁵⁸

The community's importance in the safeguarding process links with the perception that intangible cultural heritage expresses the community's stance to various aspects of the outside world.⁵⁹ This reflection to the outside world is transmitted over generations; so intangible cultural heritage has become associated with the respective communities. Communities and intangible cultural heritage are thus mutually supportive to each other.⁶⁰ Because communities are increasingly aware of this situation, a growing claim exists towards rights on their intangible cultural heritage.⁶¹ Recognition of this by the international community led to protections in several legally binding international instruments.⁶² Drafters of the ICH Convention translated this claim as active involvement by a community in the process of safeguarding. Preceding such active involvement is community recognition.

Leaving aside the unlucky representation of the fairy tales as old German legends, the Brothers Grimm's emphasis of local character should in no way be interpreted as a rejection of community recognition. Rather, the opposite is true. The Brothers Grimm were aware that different versions of the fairy tales existed in various parts of Europe. To show their awareness, they added comparative notes indicating obvious and subtle similarities and differences. These comparative notes, some offered as comprehensive comparative analysis⁶³ meticulously attached to every tale, show that the Brothers Grimm never overlooked "the possible influences from other cultures or cross-cultural variants."⁶⁴ The most obvious languages, such as other Nordic Germanic languages, received their attention as did Jewish, Persian and other, older Indo-European language versions. Some of the variants cited even came from India.⁶⁵

⁵⁸ See SAFEGUARDING TRADITIONAL CULTURES: A GLOBAL ASSESSMENT (Peter Seitel ed., 2001). See also Noriko Aikawa, *An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage*, 56 MUSEUM 137, 140 (2004).

⁵⁹ See, e.g., Walter E.A. van Beek and Fabiola Jara, "Granular Knowledge": *Cultural Problems with Intellectual Property and Protection*, in INTELLECTUAL PROPERTY LAW 2002: ARTICLES ON THE LEGAL PROTECTION OF CULTURAL EXPRESSIONS AND INDIGENOUS KNOWLEDGE 35 (F. Willem Grosheide and Jan J. Brinkhof eds., 2002); Ullrich Kockel, *Reflexive Traditions and Heritage Production*, in CULTURAL HERITAGES AS REFLEXIVE TRADITIONS 19, 28 (Ullrich Kockel and Máiréad Nic Craith eds., 2007).

⁶⁰ It could be held that early ancestors of that community have created, shaped and re-created the intangible cultural heritage. Very often this process happened in response to the outside world. Intangible cultural heritage may thus have originated from contacts with the natural environment, such as nature, landscape or climate. Intangible cultural heritage may also be a reflection of their reaction to the social environment, including their history or interactions with other communities and cultures. As the intangible cultural heritage shaped itself as a way to survive or to communicate, the ancestors have passed them through to future generations. As this process repeated itself, this intangible cultural heritage became associated with the communities.

⁶¹ See Peter-Tobias Stoll and Anja von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 5, 15-16 (Silke von Lewinsky ed., 2004).

⁶² See, e.g., International Treaty on Plant Genetic Resources for Foods and Agriculture, 3 Nov. 2001, available at <ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf> (last visited 31 Jul. 2008); Convention on Biological Diversity, 5 Jun. 1992, 31 I.L.M. 818, available at <http://www.biodiv.org/convention/convention.shtm> (last visited 31 Jul. 2008); Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 Jun. 1989, 28 I.L.M. 1382, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> (last visited 31 Jul. 2008). For a detailed explanation, see Stoll and von Hahn, *supra* note 61, at 3-47.

⁶³ Some of the comparative notes took even the form of a comprehensive comparative analysis, like the analysis of Basile's tales in the 1822 edition; see BOTTIGHEIMER, *supra* note 4, at 5.

⁶⁴ See KAMENETSKY, *supra* note 9, at 26-27.

⁶⁵ See *id.* at 26.

It would probably be incorrect to state that the Brothers Grimm framed their collection and comparative notes within the concept of communities. Together, both parts of the collection reveal the Brothers were conscious that the fairy tales they collected belonged to a wider environment from which they collected. The main part of their collection was local.⁶⁶ The comparative notes in turn delineated the locality of the main part. In this sense, the collection of the Brothers Grimm differed from the earlier collections of fairy tales. Others, including Perrault and Basile, failed to show how their collections belonged to their local environment.⁶⁷ It is only by taking the local versions of the fairy tales out of their comparative context⁶⁸ or by a selective reading of the whole picture,⁶⁹ which would create the perception that the Brothers Grimm neglected the whole context to which the fairy tales belong. The smaller editions of the *Kinder- und Hausmärchen* without the comparative notes may have fuelled the feelings that the Brothers Grimm ignored the broader context of the time.⁷⁰

The awareness that variations and parallel tellings of the same tales in different parts of Europe are important externalizes a close connection to the present day thinking of

⁶⁶ The mainstream movement of the early nineteenth century, Romanticism, corresponds with an awakening interest for the native roots a language, law or history of a nation. The Brothers Grimm's main emphasis on the local community's perception of the fairy tales is thus not entirely uncommon; *see id.* at 25. At the same time, it should be indicated that the locality of the stories was only one part of the Brother Grimm's interest. Like other scholars and writers in the Romantic movement, they developed a strong devotion to comparative research; *see id.* at 25.

⁶⁷ The literature mentions that Perrault gets his information from storytelling of the popular mass and troubadours. The latter is most likely restricted to his direct environment. However, direct statements in this sense cannot be found; *see* Lewis Seifert, *The Marvellous in Context: The Place of the Conte de Fées in Late Seventeenth-Century France*, in *THE GREAT FAIRY TALE*, *supra* note 14, at 902, 905, 907-8. It is even said that the French writers in general did not really care about this aspect; *see id.* at 904-5 ("none of the seventeenth-century *conteurs* and *conteuses* endeavored to transcribe folkloric narratives out of anything resembling ethnographic interest."). Hypotheses suggesting Perrault received inspiration from Basile are flawed because no translation from French existed and no textual convergences between the two authors occurred; *see* IONA OPIE AND PETER OPIE, *THE CLASSIC FAIRY TALES* 25 (1974). There seem to be indications that literary sources influenced Perrault's work, though; *see* Harry Velten, *The Influence of Charles Perrault's Contes de ma Mère L'oise on German Folklore*, in *THE GREAT FAIRY TALE TRADITION*, *supra* note 14, at 958, 959. Regarding Basile, the literature identifies his long residence in Venice and Naples, and therefore suggest these areas as his main source of fairy tales; *see* Jack Zipes, *Cross-Cultural Connections and the Contamination of the Classical Fairy Tale*, in *THE GREAT FAIRY TALE TRADITION*, *supra* note 14, at 845, 855. References to these cities in Basile's fairy tales only further support this view; *see id.* at 856. The literature also states his possible awareness of stories collected by Giovan Francesco Straparola, even though there is no clear proof for that. However, this only fortifies belief that part of Basile's fairy tales came from Venice and its surroundings. It could also explain Basile's acquaintance with Oriental tales. Straparola, having spent his whole life in the thriving port city Venice, had come in contact with Oriental tales; *see id.* at 854-55.

⁶⁸ Taylor, for example, did not translate the extensive comparative notes; *see* GRIMM AND GRIMM, *supra* note 55. It was not until 1884, when Margaret Hunt translated the work of the Brothers Grimm that the comparative notes were made available to a public not fluent in German or who had limited access to the German complete edition of 1957; *see* JACOB GRIMM AND WILHELM GRIMM, *GRIMM'S HOUSEHOLD TALES: WITH THE AUTHOR'S NOTES*, Vol. I and II (Margaret Hunt ed. and trans., Georg Bell 1892). It should be noted that the translation of Hunt was more accurate than the one made by Taylor; *see* KAMENETSKY, *supra* note 9, at 312. Taylor liberally translated the works and later excused himself several times for that to the Brothers Grimm; *see id.* at 198 and 223-25; BOTTIGHEIMER, *supra* note 4, at 19. *See also* Otto Hartwig, *Zur ersten englischen Übersetzung der Kinder- und Hausmärchen der Brüder Grimm* [About the First English Translations of the Children and Household Tales], *XV ZENTRALBLATT FÜR BIBLIOTHEKSWESSEN* [Central Magazine for Libraries] 1 (1898).

⁶⁹ *See* KAMENETSKY, *supra* note 9, at 294; BOTTIGHEIMER, *supra* note 4, at 22; GEORG SCHOTT, *WEISSAGUNG UND ERFÜLLUNG IM DEUTSCHEN VOLKSMÄRCHEN* [Fortune Telling and its Realization in German Folk Tales] 40 (1936) (describing how reading *Cinderella* required contextualizing within ideals of racial purity).

⁷⁰ The smaller editions appeared on the market after the English translations without the comparative notes and with illustrations appeared to be a commercial success. The smaller editions were commercially more attractive than the large volumes with comparative notes. *See* BOTTIGHEIMER, *supra* note 4, at 20.

intangible cultural heritage belonging to a community. The recognition of communities is indirectly inscribed in the ICH Convention in Articles 11 and 15. While the latter deals with the soft obligation of State Parties to ensure the widest possible participation of the communities in the process of safeguarding,⁷¹ the former demands from the States the participation of the communities to identify and define the various elements of the intangible cultural heritage present in its territory. This participation only materializes if the States recognize the community for whom the intangible cultural heritage is important. Like the Brothers Grimm, an indirect way to defining communities is to make a reference to different variants in the inventory. The advantage of this indirect way is that only few, if some at all, legal implications are attached. Recognition may occur in a direct way by granting the community rights in relation to the inventory or by actively involving the community in the activities surrounding inventory making.

3.2. *Community Involvement*

It was long thought that oral traditions of illiterate peasants, shepherds or other simple folk provided the main source of information for the Brothers Grimm, Perrault and Basile, to create their collection of fairy tales.⁷² The belief romanticizes the notion of a collector who travelled to remote rural areas in order to gather the fairy tales. Building further on this belief, the fairy tale collectors then transcribed the stories as the storytellers told them. Regardless of the result, this would have meant an active participation of a geographically determined group of people sharing some common folk traditions. The belief thus wants that communities were obviously of utmost importance at the initial stage of setting up the different collections of fairy tales. However, studies of the last two to three decades have shown that this belief is a myth.⁷³ The Brothers Grimm, Perrault and to a lesser extent Basile⁷⁴ attributed themselves a prominent role in setting up the collections of fairy tales that was minimal, at best, and far from objective.

⁷¹ Even though this obligation is embedded in a treaty, which is usually seen as a form of hard law, the wording “endeavor to” renders it soft law; see Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE, *supra* note 29, at 21, 25-26 (calling this phenomenon the fusion of “legal form with soft obligations”).

⁷² See Croce, *supra* note 22, at 899 (referring to Wilhelm Grimm who noted that “Basile has not allowed himself to make any alteration, scarcely even any addition of importance, and that gives his work special value.”) and 900 (“Basile culled his tales directly from the people, as is attested by the virgin freshness of their form.”); Seifert, *supra* note 67, at 908 (“Whether they rely on the storytelling of the popular masses or the troubadours, both Perrault ... convey nostalgic and, thus, idealized visions of folklore.”); KAMENETSKY, *supra* note 9, at 113-14 (“[i]t used to be a misconception among critics that the Grimms made actual trips into the countryside to collect folktales from the common peasants so as to capture the living folk tradition.”), 142 (quoting words from Wilhelm Grimm stating that “Perrault has perceived the folktales in an undiluted form, and aside from some minor elements, has added nothing to them”) and 201 (“his expression ‘by word of mouth’ was the phrase that many critics after his time mistook for the Grimms’ sole method of recording tales”).

⁷³ See Zipes, *supra* note 67, at 855 (“Not only did he draw on an abundance of literary and historical sources to create his hilarious ironical tales”); Croce, *supra* note 22, at 891 (suggesting creative intervention by Basile by stating that “Basile managed ... to make the Neapolitan dialect even more Neapolitan than it really is”); KAMENETSKY, *supra* note 9, at 67 (“From this perspective, to say that the Brothers Grimm looked for folktales ‘among the peasants’ is truly an understatement”) and 114 (“The myth that the Grimms’ informants had mainly been illiterate German peasant folk from rural areas of Hesse has now been largely dispelled.”). Opposite of what seems to be the case for the Brothers Grimm and Basile, Perrault’s collections seem not to have been embedded with the same amount of mythical power. Rather, it seems the opposite was proven, namely that he had some contacts with the popular mass; see Lewis Seifert, *supra* note 67, at 905 (“Soriano shows ... that Perrault himself was an avid but unsentimental observer of popular folklore.”) and 905 n.8 (“Perrault ... demonstrates a wide and detailed knowledge of folkloric narratives.”).

⁷⁴ See Croce, *supra* note 22, at 901 (“Nevertheless, this critic is still of the opinion that, after due comparison, it is evident that Basile wrote independently of Straparola.”).

Rather than being impartial recorders of tales present in their environment, they engaged actively in the process of writing the fairy tales. Perrault outright created some of his fairy tales.⁷⁵ Jacob Grimm himself contributed not less than 17 fairy tales to the first edition of the *Kinder- und Hausmärchen*,⁷⁶ and Wilhelm Grimm wrote 9 of the fairy tales to this edition.⁷⁷ Having enjoyed a university education,⁷⁸ the Brothers Grimm certainly did not represent the illiterate peasants. Many of the other main informants, such as the family Wild, Hassenplug or von Haxthausen, came from the same educated middle class.⁷⁹ Not all other key informants belonged to this educated middle class, but most were certainly not peasants or shepherds as the myth wants us to believe. Frau Viehmänn, even though referred to as a peasant woman by the Brothers Grimm, was actually a poor widow of a tailor living in the rural area of Zwehrn.⁸⁰

Furthermore, there is discussion in the literature of whether all of these informants were familiar with the fairy tales as they were told in Germany. The Huguenot background of several informants led critics to conclude that their fairy tale versions were influenced by the French tradition.⁸¹ Though perhaps speculation or misconception, the Brothers Grimm do not conceal that some were tainted by the French tradition.⁸² For example, doubtlessly Perrault's version of *Puss in the Boots* was the basis for the Brothers Grimm's version.⁸³ Less clear is the relationship between versions of *Little Red Riding Hood*.⁸⁴ As for the other fairy tales resembling Perrault's version, like *Cinderella*⁸⁵ or *Bluebeard*,⁸⁶ the Brothers Grimm made clear that, despite their close knowledge of that version, they were able to test its roots in the German oral tradition. Similarly, Perrault reverted to earlier written work in order to collect some of his fairy tales.⁸⁷ No specific evidence shows Basile utilized this tactic, but it is presumed he did so.⁸⁸

The myth further propagates the notion of literal transcription of oral tales by the collectors without any creative intervention.⁸⁹ Under such circumstances, the fairy tale collectors would respect community involvement. However, once transcribed, the Brothers Grimm, Perrault and Basile (the latter two to a lesser extent) showed quite some infidelity to their sources.⁹⁰ Departure from original sources should not necessarily be understood as a

⁷⁵ Wilhelm Grimm seems to speculate that Perrault invented some of his fairy tales; see KAMENETSKY, *supra* note 9, at 142.

⁷⁶ See *id.* at 114.

⁷⁷ See *id.*

⁷⁸ See *id.* at 14-17 and 114.

⁷⁹ See Zipes, *supra* note 67, at 866.

⁸⁰ See KAMENETSKY, *supra* note 9, at 116; See also Zipes, *supra* note 67, at 866.

⁸¹ See Zipes, *supra* note 67, at 866; KAMENETSKY, *supra* note 9, at 118-21.

⁸² See Velten, *supra* note 67, at 959.

⁸³ See KAMENETSKY, *supra* note 9, at 143.

⁸⁴ See *id.* at 143-44.

⁸⁵ See BOTTIGHEIMER, *supra* note 4, at 35-36; Velten, *supra* note 67, at 963.

⁸⁶ Compare KAMENETSKY, *supra* note 9, at 142-143, with Velten, *supra* note 67, at 968.

⁸⁷ See Velten, *supra* note 67, at 968 (indicating that the *Decamerone* from Giovanni Boccaccio was an inspirational source for Perrault).

⁸⁸ Even though Basile may have got inspiration from Straparola, this would not have affected his community involvement as much as with the other collectors. At the end, both Basile and Straparola were relying on Venetian tales; see Zipes, *supra* note 67, at 855.

⁸⁹ The collectors themselves created a part of this myth. At the end, they claimed to be faithful to their sources; see Neumann, *supra* note 14, at 971 n.7.

⁹⁰ See, e.g., TATAR, *supra* note 7, at 6 ("The changes made from the first to the second edition ... show just how keen the Grimms must have been to give added prominence to violent episodes") or 7 ("what they did their best to eliminate from the collection through vigilant editing"); Croce, *supra* note 22, at 891 (stating that "Basile managed ... to make the Neapolitan dialect even more Neapolitan than it really is"); Velten, *supra* note 67, at 967 ("Perrault may have reported a mutilated variant."). Worse than creative interventions of the collectors, was

negative point. To that end, intangible cultural heritage is a living heritage and thus can change.⁹¹ Whenever the community indicates that a fairy tale evolves, a fairy tale collector should respond. However, changes within fairy tale collections, not driven by community involvement, are problematic, as the intangible cultural heritage does not present anymore the spirit of that community. Without indicating any reason, the Brothers Grimm changed the villain of the *Hansel and Gretel* fairy tale from the mother to the stepmother.⁹² Identically, the Brothers Grimm leave out the fairy godmother in *Cinderella* from their second edition of *Kinder- und Hausmärchen* onwards. The role of the fairy godmother is taken over by Cinderella's biological parents.⁹³

Whereas the myth of searching and transcribing fairy tales told by illiterate peasants closely links with the present day thinking of community involvement, the real practice reveals several problematic issues. It would be problematic if an inventory made today referenced fairy tales that the inventory maker knows and includes. Verification of community support requires further historical and empirical research. In fact, the Brothers Grimm did this for most of their fairy tales.⁹⁴

Once the link between a fairy tale and a community is made, the inventory maker seeks community consent. Likely, this can only be obtained if the community fully understands the project.⁹⁵ In this respect, all three of the mentioned fairy tale collectors fail. None of them took steps at developing a collection of fairy tales with a community in mind. This probably also explains why they showed indifference towards making alterations or adjustments. This especially applies to the Brothers Grimm's successive editions, which changed little over time. Inventories in a contemporary world should, given the emphasis on the importance of communities and their involvement, reflect changes related to community practice.

The ICH Convention includes community involvement, specifically in Articles 11 and 15. The former demands "the participation of communities, groups and relevant non-governmental organizations." The latter, however, uses softer language. This article only

intervention by Georg Reimer, the publisher of several early editions of *Kinder- und Hausmärchen*; see KAMENETSKY, *supra* note 9, at 167 ("In spite of their principled approach to the editing task, the Grimms sometimes encountered circumstances beyond their control. This referred specifically to the interference of their publisher, Georg Reimer, in Berlin, who was responsible for all editions of the *Kinder- und Hausmärchen* until 1832. ... Ironically, one of the Grimms' supposedly most authentic tales, 'The fisherman and his Wife,' underwent a strange transformation for which they were not responsible. ... Reimer assumed the authority to edit the folktale by himself.").

⁹¹ The living nature of intangible cultural heritage is often depicted in the sense that documentation is able to freeze it; see, e.g., Chapter [Oguamanam] of the present volume; Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT. J. CULT. PROP. 40, 45 (2005). The Brothers Grimm allude to the living nature in their first edition. They hold that "fairy tales are 'never fixed and always changing from one region to another, from one teller to another';" see Neumann, *supra* note 14, at 975. However, some of their changes belong to the Brothers Grimm's moral perception than to the living nature of the fairy tales; see TATAR, *supra* note 7, at 11.

⁹² See MARIA TATAR, *THE ANNOTATED CLASSIC FAIRY TALES* 45 (2002). Similarly, the villain in the original Snow White was not the stepmother, but Snow White's mother; see TATAR, *supra* note 7, at 36-37.

⁹³ See BOTTIGHEIMER, *supra* note 4, at 36.

⁹⁴ See KAMENETSKY, *supra* note 9, at 143-44.

⁹⁵ See Chapter [Arantes] of the present volume (pointing out that paying respect to communities is essential in the present day context of inventory making). This importance was stressed again at the expert meeting held by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and Asia/Pacific Cultural Centre for UNESCO (ACCU) in 2006 in relation to community involvement as part of the preparatory work for the convention's entry into force. The community must receive an explanation about the project they are cooperating with, what the ultimate purpose is, how they will be involved and how they will benefit. Giving the community in advance this kind of information allows them to give their prior and informed consent to the project.

requires that States “endeavour to ensure the widest possible participation of communities”. Even though these two articles seem to be in direct conflict with each other, a logical explanation can be given if one dissects the term safeguarding into different steps. The hard obligation of Article 11 applies to the initial stage of the safeguarding, specifically the identification and definition stage. For all later stages of safeguarding, the State Parties have discretion in seeking community involvement. In this sense, both provisions can stand next to each other.

The soft wording of Article 15 affects implementation of Article 11. During the preparatory stage of the ICH Convention, it was pointed out that forcing the State Parties to set up participation policies would conflict with the sovereign right of these States. Germany, along with Australia, Turkey, France and India, warned that including this kind of obligation required State willingness to comply, regardless of effects on sovereignty. Even though these countries worried about unwillingness to participate, Vanuatu, Bangladesh, Austria and Mauritius all supported an approach advocating community participation.⁹⁶

Without a bedrock definition, different interpretations of the word “participation” could arise amongst members. Given the soft law obligation of community participation in Article 15⁹⁷ and a sovereignty enforcing Article 12(1) in relation to inventory making,⁹⁸ certain State Parties will give a minimalist interpretation to participation. These State Parties might opt for a purely consultative role of the communities, without giving them any decisive rights. The only way to induce State Parties to increase the involvement of the communities would be via the Operational Directives on the condition that the lack of involvement would have some repercussions.

The Operational Directives could contain the “community involvement” as a selection criterion for the Representative List. On the contrary, the lack of proper community involvement or the disappearance of it could either reason for not listing the intangible cultural heritage at all or a criteria to inscribe the intangible cultural heritage on the *List of Intangible Cultural Heritage in Need of Urgent Safeguarding* (List in Need for Urgent Safeguarding). Limiting or denying international assistance represents another realistic repercussion for not involving communities in the application process or the management of the intangible cultural heritage.

Analyzing the language of the Operational Directives regarding the Representative List,⁹⁹ the List in Need for Urgent Safeguarding¹⁰⁰ and, maybe to a lesser extent, international assistance,¹⁰¹ the Operational Directives reveal a similar tone as the ICH Convention. The politically sensitive issue of granting rights to communities,¹⁰² as it is reflected in the ICH Convention, is also found in the Operational Directives. This implies that in certain cases State Parties have to be given the opportunity to overcome the political

⁹⁶ See BLAKE, *supra* note 32, at 62.

⁹⁷ See *supra* text accompanying note 70.

⁹⁸ See *supra* Section 2.

⁹⁹ The Operational Guidelines, however, leaves the examiners with quite a lot of discretion; see Operational Directives, *supra* note 29, ¶ 19, R.4 (“The element has been nominated following the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent.”).

¹⁰⁰ The text for the List in Need for Urgent Safeguarding is identical to the one for the Representative List; see Operational Directives, *supra* note 29, ¶ 1, U.4 (“The element has been nominated following the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent.”).

¹⁰¹ See Operational Directives, *supra* note 29, ¶ 67 (One of the selection criteria for international assistance is that “The community, group and/or individuals concerned participated in the preparation of the request and will be involved in the implementation of the proposed activities, and in their evaluation and follow-up as broadly as possible”).

¹⁰² See BLAKE, *supra* note 32, at 62 and 76-77.

obstacles attached to empowering communities with legal rights. Such can be done by creating flexibility as to how State Parties incorporate the communities in the inventory making process. Like the Brothers Grimm, Perrault and Basile, State Parties will only rely on community involvement to the fullest extent possible or needed.

Further, State Parties find some guidance in Article 15 of the ICH Convention, regarding how community involvement can materialize. The ending of this article, phrased as "... and to involve them actively in its management,"¹⁰³ allows us to construe two important guidelines. First, management presupposes information. If State Parties involve communities in the management of their intangible cultural heritage, these State Parties should share long-term plans. Indirectly, this provision embeds the idea of prior and informed consent. The Operational Directives externalize this concept. In fact, they suggest that prior and informed consent is the key to community involvement.¹⁰⁴ Second, once inventories are created, community involvement ensures needed updates as intangible cultural heritage evolves. Doing so prevents intervention from the inventory maker, unlike methods of the Brothers Grimm, Perrault and Basile, who actively changed stories as needed and outright disregarded the natural evolution of tales. These steps maintain the integrity of intangible cultural heritage.

4. THE SCOPE OF INVENTORIZATION

4.1. Intangible Cultural Heritage Embedded in a Broader Context

The primary technique employed by the Brothers Grimm, Perrault and Basile for creating collections of fairy tales was transcribing orally transmitted stories. In doing so, they wrote down complete fairy tales. For example, the fairy tale *Hansel and Gretel*¹⁰⁵ tells us a story of two children of a poor woodcutter, who, egged on by his wife, leads his children into the forest to abandon them. Hansel and Gretel try to leave a trail home, but instead arrive at a house made of bread. An old woman invites them to her house. She is in fact a witch and wants to fatten the children to eat them. Gretel saw through the scheme and was able to outwit the witch by tricking her to climb in the oven and close the door. She then liberates Hansel, and the two escape back home to their (relieved) father.

It is less well known that different parts of the fairy tale have changed over the time. The wife of the woodcutter appears in the early versions of the fairy tales as a mother of the two children. Later versions of the fairy tale depict her as the stepmother of the children. The house made of bread turns into a house made of gingerbread in later versions. By the time of the last edition, *Hansel and Gretel* had become twice as long as the original version in 1810.¹⁰⁶ Similar alterations happen in other fairy tales as well.¹⁰⁷ The collections of fairy

¹⁰³ ICH Convention, *supra* note 8, art. 15.

¹⁰⁴ See Operational Directives, *supra* note 29, ¶ 1, U.4, and ¶ 19, R.4.

¹⁰⁵ Dortchen Wild passed the fairy tale *Hansel and Gretel* to the Brothers Grimm. The first part of the Brothers Grimm's version of this fairy tale resembles closely *Le Petit Poucet* written by Perrault in 1679. Madame d'Aulnoy published in 1721 a story *Finette Cendron* in which she also depicts the abandonment of children in the deep wood, but who manage to find their way back by leaving a trail. The house build of delicious foodstuff has resemblance with a fourteenth century manuscript, telling the story of the *Utopian Land of Cockayne*; see OPIE AND OPIE, *supra* note 67, at 308-11 (history part of this fairy tale) and 312-19 (the fairy tale of *Hansel and Gretel* as it appeared translated in the 1853 *Household Stories collected by the Brothers Grimm*).

¹⁰⁶ See THE GREAT FAIRY TALE TRADITION, *supra* note 14, at 699.

¹⁰⁷ The beginning of *The Frog King*, for example, changed over time. What follows is a quotation out of the beginning of this fairy tale from the 1812, 1819 and the 1857 edition respectively:

tales do not contain an explanation of why these changes occur. Similarly, these collections lack social background information to contextualize their nuance. In other words, these collections limit their scope to the intangible cultural heritage as such. No attention is paid to the environment surrounding the intangible cultural heritage. There exists only one exception.¹⁰⁸ The Brothers Grimm, with their comprehensive comparative notes, provided the reader with the insight that similar sociological, psychological, anthropological, educational or any other kind of concern may have existed in various other communities.¹⁰⁹

Though mostly ignored, some contextual debate occurred outside the publications. The Brothers Grimm found frequent criticism of their belief that the fairy tales were appropriate, understandable and digestible for children, as the title of their collection seems to imply.¹¹⁰ In their response, the Brothers Grimm took a balanced approach to indicate that there was not a clear “either-or”¹¹¹ answer. Pleased by the appeal of their fairy tales to children’s imagination, they strongly believed that children should be given the chance to read them **without the interference an adult, being it as a parent or a teacher**.¹¹² The wisdom of the fairy tales illuminate and spark what a child already knows. The incomprehensible elements should be left for the future, alluding to the potential of these fairy tales for adults.

Once upon a time there was a king’s daughter who went into the forest and sat down on a cool well. She had a golden ball that was her favorite toy. She would throw it up and catch it in the air and was amused by this ...

Once upon a time there was a king’s daughter who was so bored she didn’t know what to do. So she took a golden ball that she often played with and went into the forest. Now in the middle of the forest there was a clear, cool well and she sat down next to it, threw the ball into the air, and she would play this way ...

In olden times, when wishing still helped, there lived a king whose daughters were all beautiful, but the youngest was so beautiful that the sun itself, which had seen so many things, was always filled with amazement each time it cast its rays upon her face. Now, there was a great dark forest near the king’s castle, and in this forest, beneath an olden linden tree, was a well. Whenever the days were hot, the king’s daughter would go into the forest and sit down by the edge of the cool well. If she became bored, she would take her golden ball, throw it into the air, and catch it. More than anything else she loved playing with this ball ...

See Neumann, *supra* note 14, at 973-74. For a comparison of *Cinderella*’s versions, see BOTTIGHEIMER, *supra* note 4, at 44-45 and 177-78. See also *supra* text accompanying notes 92 and 93.

¹⁰⁸ Tatar indicates that the study of variants is a necessary condition in order to speak meaningfully about the context surrounding a fairy tale. She describes this issue with the words “[a]ny attempt to unearth the hidden meaning of fairy tales is bound to fail unless it is preceded by a rigorous, if not exhaustive, analysis of a tale type and its variants.” See TATAR, *supra* note 7, at 43. The reason why the comparative analysis is so important, according to Tatar, lies in the fact that it will enable the “interpreter to distinguish essential features from random embellishments and to identify culturally determined elements that vary from one regional version of a tale to the next.” See *id.*

¹⁰⁹ Tatar eloquently describes that all these variants indicate different meanings by stating that

One of the chief sources of irritation for the interpreter of fairy tales is the nature of folkloric sources. For nearly every tale, there are at least a dozen versions, in some cases hundreds of extant variants. In other words, rather than a single, stable literary text in which even the finest points of detail may function as bearers of significance, we have an infinite number of corrupt “texts,” spoken and written, each representing one version of a single tale type, and an imperfect version. See *id.* at 42.

¹¹⁰ See KAMENETSKY, *supra* note 9, at 192-95.

¹¹¹ *Id.* at 192.

¹¹² See *id.* at 192-93.

The fairy tales, according to the Brothers Grimm, reflect the substance of life as they combine history, mythology, poetry, moral values and the like.¹¹³

The wider context of the fairy tales inspired many adults' imaginations. The fairy tales were researched from a diversity of perspectives. Anthropologist research shows that the fairy tales are a reflection of social customs, beliefs and rituals formed by an animated view of nature and the world.¹¹⁴ Contrary to this literal view, scholars advocate a symbolic meaning of the fairy tales, of which the psychological perspective would be one example.¹¹⁵ The fairy tales represent the conscious and unconscious forces of the world in human terms. Somewhere in between these extremes, we can find a feminist¹¹⁶ or socio-historical perspective.¹¹⁷ Others see a nationalistic reading of the fairy tales.¹¹⁸ Still others agree with Perrault's assessment that the fairy tales are nothing else than a way of expressing moral and ethical claims.¹¹⁹

These perspectives developed after the Brothers Grimm, Perrault or Basile finalized their collections. Because a contextual vacuum preceded analysis, these different perspectives flourished. Such an array of post-publishing viewpoints can be tempered by taking Antonio A. Arantes's view on inventory making, presented elsewhere in this volume. Arantes stipulates that an inventory must encompass the broader context or environment in which intangible cultural heritage is embedded.¹²⁰ An inventory is not just the transcription of a storyteller's fairy tale; *e.g.*, besides a story of Hansel and Gretel, the inventory needs to contain elements that place the story in its context. Arantes lists several elements in this respect. Among these are issues of the origin and the historical continuity, social life and social memory, and attributed.¹²¹ In doing so, Arantes seeks to externalize the notion of intangible cultural heritage, an expression of a community to the outside world in general, into a practical instrument, the inventory.

4.2. *Fearing All-Encompassing Inventories*

Including context in inventory making creates all-encompassing inventories. Modern techniques of documentation create thorough results in terms of visibility and accessibility. Such deep reach may alienate some communities of their intangible cultural heritage. Michael F. Brown concludes Indigenous communities may not be eager to cooperate with the extensive documentation of their intangible cultural heritage.¹²² He asserts that communities'

¹¹³ See *id.* at 193.

¹¹⁴ See, *e.g.*, Andrew Lang, *Household Tales; Their Origin, Diffusion, and Relation to higher Myths*, in GRIMM'S HOUSEHOLD TALES, *supra* note 68, Introduction; Bronislaw Malinowsky, *Myth in Primitive Psychology*, in MAGIC, SCIENCE, AND RELIGION AND OTHER ESSAYS 99 (Bronislaw Malinowsky ed., 1954).

¹¹⁵ See, *e.g.*, BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES (1977); Carl Gustav Jung, *On the Relation of Analytical Psychology to Poetry*, in THE PORTABLE JUNG 301-22 (Joseph Campbell ed., F. C. Hall trans., 1983) (1922).

¹¹⁶ See, *e.g.*, Kay F. Stone, *Feminist Approaches to the Interpretation of Fairy Tales*, in FAIRY TALES AND SOCIETY: ILLUSION, ALLUSION AND PARADIGM 229 (Ruth B. Bottigheimer ed., 1986).

¹¹⁷ See, *e.g.*, Zipes, *supra* note 57 (1988); JACK ZIPES, THE BROTHERS GRIMM: FROM ENCHANTED FORESTS TO THE MODERN WORLD (1988); Otto Kahn, *Rumpelstilz hat wirklich gelebt. Textvergleichende Studie über das Märchen vom Rumpelstilzchen und eine Erklärung mit Hilfe der Rechtsgeschichte* [Rapunzel has actually lived. A Textual Comparative Study of the Rapunzel Fairy Tale and an Explanation by Using Legal History], 17/18 RHEINISCHES JAHRBUCH FÜR VOLKSKUNDE 143 (1966/67).

¹¹⁸ See, *e.g.*, CHRISTA KAMENETSKY, CHILDREN'S LITERATURE IN HITLER'S GERMANY: THE CULTURAL POLICY OF NATIONAL SOCIALISM (1984); SNYDER, *supra* note 49; Siecke, *supra* note 48; Kamenetsky, *supra* note 54.

¹¹⁹ See, *e.g.*, KARL-HEINRICH HIEMESCH, DER GESINNUNGSUNTERRICHT [Ideological Teachings] (1925).

¹²⁰ See Chapter [Arantes] of the present volume.

¹²¹ *Id.*

¹²² See Brown, *supra* note 91, at 48.

preferred strategy will be, and he quotes the words of the anthropologists Eric C. Kansa, “security through obscurity”.¹²³

Brown’s critique of extensively documented inventories is justified. It might not be what the communities want. This possibility exists when States implement Article 12(1) of the ICH Convention. This particular provision, being silent on many aspects of inventory making, is revealing on one particular issue. The inventory should enable the identification of the intangible cultural heritage present in a State’s territory. From a purely legalistic point of view, State Parties are not obliged to extend their inventories beyond a stage in which the identification is ensured. This minimalist approach can then be brought in line with Brown’s comment that anthropology presently recognizes the modest role of documentation in the preservation of culture.¹²⁴

On points left silent in the ICH Convention, some clarification comes from expert meetings held by UNESCO in 2005 and 2006 dealing with inventory making as part of the preparatory work for the ICH Convention’s entry into force.¹²⁵ Except for being minimalist, the scope of the national inventories is an open question.¹²⁶ Nothing has been stipulated in regard to the criteria for listing in the national inventories.¹²⁷ The ownership of the inventories is also not addressed.¹²⁸ It is further not determined how the communities, who according to Article 11(2) of the ICH Convention have a role within the identification process, should be involved.¹²⁹ Another issue not discussed in the expert meetings, but put forward by Janet Blake, is whether the national inventories should be disclosed to the public.¹³⁰

Focusing on the issues of the inventory itself, scope, openness, and listing criteria, ignores one central question; that is, how does the ICH Convention leave it up to State Parties to develop inventories according to the necessity of the intangible cultural heritage and their ability. No one method of inventory exists, as should be obvious from flexibility afforded under Article 12. Even though the first Operational Directives prepared by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage do not do so,¹³¹ next versions could formulate principles on national inventories. To avoid jeopardizing strengths provided by flexibility, the Operational Directives could contain a non-exhaustive list of non-binding guidelines for national inventorization. The more binding the rules, the more likely the inventorization ends up in the unfortunate situation depicted by Brown.¹³²

5. INVENTORIES EMBEDDED IN A BROADER POLICY FRAMEWORK

5.1. Intellectual Property Issues

Perrault and Basile, and to a lesser extent the Brothers Grimm,¹³³ wrote in an era without

¹²³ *Id.* at 56 n. 26.

¹²⁴ *Id.* at 48.

¹²⁵ See UNESCO, *Report of the Expert Meeting on Inventorying Intangible Cultural Heritage* (17-18 Mar. 2005), available at <http://www.unesco.org/culture/ich/doc/src/00036-EN.pdf> (last visited 31 Jul. 2008).

¹²⁶ See *id.* at 12 (summary of keynote speech by Marcia Sant’Anna).

¹²⁷ See *id.* at 16 (summary of keynote speech by Chérif Khaznadar).

¹²⁸ See *id.* at 29-30 (summary of keynote speech by Wend B. Wendland).

¹²⁹ See *id.* at 32-33.

¹³⁰ The concerns of the community or group should be the determinant factor on whether the State creates an open inventory or a closed one; cf. BLAKE, *supra* note 32, at 63 (suggesting that the disclosure of the national inventories seems to be instigated by the broad flexibility of ICH Convention, *supra* note 8, art. 12).

¹³¹ See Operational Directives, *supra* note 29.

¹³² See Brown, *supra* note 92, at 48-49.

¹³³ The issues of copyright receive vigorous discussion during the early 19th century; see Uma Suthersanen, ‘Bleak House’ or ‘Great Expectations’?: *The Literary Author as a Stakeholder in nineteenth-Century*

intellectual property rights, copyrights specifically. All their collections of fairy tales developed from borrowing intangible cultural heritage from communities and from each other. Within their time, this appropriation of the intangible cultural heritage and the subsequent alterations were not considered exploitation or misuse. Moreover, as Fiona Macmillan illustrates in relation to Hans Christian Andersen, a contemporary to the Brothers Grimm, that it was common practice to make use of the cultural commons either as collections or recreated as new stories at that time.¹³⁴

The Brothers Grimm, Perrault, Basile were in no sense different than their peers. They understood it as their right to collect, transcribe, adapt or transform what was out there. The difference between the Brothers Grimm on the one side, and Perrault and Basile on the other, was how they perceived their role as collector. For Perrault and Basile, being a collector was equal to being author. Perrault published his collection under the pseudonym Pierre Perrault Darmancourt.¹³⁵ Basile's sister published the work under the pseudonym Gian Alessio Abbattutis.¹³⁶ The Brothers Grimm, however, identified their final product as "collected by the Brothers Grimm".¹³⁷ This *belonging to others* manifests another awareness of the community's importance. As earlier indicated in this Chapter, this stage of awareness was still embryonic in the sense that the Brothers Grimm did not systematically reveal community origins.¹³⁸ Consequently, the *Kinder- und Hausmärchen* collections are usually identified with the Brothers Grimm rather than with the community behind it.

Placing the ICH Convention within the Brothers Grimm's time framework would still allow leeway for the appropriation and use of the fairy tales. Nothing in the ICH Convention stipulates that the inventory belongs to the community.¹³⁹ The inventory maker can, just as Perrault or Basile did, identify himself with the inventory. Differently, inventory maker can stipulate that he has been in charge of putting together the information, just as the Brothers Grimm did. Moreover, the ICH Convention does not prohibit profiting from inventory making. There is no provision in the convention limiting the rights of third persons in respect to either the inventory maker or the community. The development of intellectual property laws often provide basis for criticism for the ICH Conventions that lacks attention to the inventory's information protection.¹⁴⁰ The ICH Convention is therefore often seen as a missed opportunity to merge intellectual property law issues with heritage law issues.¹⁴¹

Wend B. Wendland, elsewhere in this volume, indicates that one should not perceive the ICH Convention in this way. The ICH Convention is safeguarding orientated, in which

International Copyright Politics, in COPYRIGHT AND OTHER FAIRY TALES: HANS CHRISTIAN ANDERSEN AND THE COMMODIFICATION OF CREATIVITY 40 (Helle Porsdam ed., 2006).

¹³⁴ See Fiona Macmillan, *What Might Hans Christian Andersen Say About Copyright Today?*, in COPYRIGHT AND OTHER FAIRY TALES, *supra* note 133, at 83 (Helle Porsdam ed., 2006). It has to be stipulated that, unlike the Brothers Grimm, Perrault and Basile, Hans Christian Andersen did not use the cultural commons extensively. Rather than transcribing fairy tales known within Scandinavian communities, Hans Christian Andersen made "transformative use" of the existing folk tales or other literary works; *see id.* at 85. *See also* DIANA CRONE FRANK AND JEFFREY FRANK, *THE STORIES OF HANS CHRISTIAN ANDERSEN* (2004).

¹³⁵ *See* THE GREAT FAIRY TALE TRADITION, *supra* note 14, at 839.

¹³⁶ *See id.* at 824.

¹³⁷ The editions of the *Kinder- und Hausmärchen* were always published with the indication "collected by the Brothers Grimm"; *see, e.g.*, BRÜDER GRIMM, *supra* note 1 ("gesammelt durch die Brüder Grimm") (author's translation).

¹³⁸ *See supra* Section 3.

¹³⁹ *See* ICH Convention, *supra* note 8.

¹⁴⁰ *See* Paul Kuruk, *Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage*, 1 MACQUARIE J. INT'L & COMP. ENV'L. L. 111, 129 (2004), available at http://www.law.mq.edu.au/html/MqJICEL/vol1/vol1_5.pdf (last visited 31 Jul. 2008).

¹⁴¹ *See id.* at 129.

the viability of the intangible cultural heritage is the central issue. Intellectual property law, on the contrary, aims at protection.¹⁴² Protection refers to the protection of intangible creations and innovations from illegitimate exploitation and misuse. Since the aim of both laws is different, they complement rather than contradict. Even though intellectual property issues arise in connection with the process of inventorying and the management of the inventories, they should not present obstacles for inventorying. Wendland points out that only some legal and practical steps have to be taken to overcome the intellectual property issues. Wendland indicates that the World Intellectual Property Organization (WIPO) has done an effort by setting up the *Creative Heritage Project*¹⁴³ in which they give best practices and guidelines for recording, digitizing and disseminating intangible cultural heritage.

Interestingly, Wendland seems to be willing to clinically separate the ICH Convention from any of intellectual property law aspect.¹⁴⁴ Given the intellectual property law related statement in Article 3 of the ICH Convention, this analysis seems to be plausible. It states that the ICH Convention may not be interpreted as affecting a State Party's rights or obligation under an intellectual property rights instrument. However, it cannot be the purpose of the ICH Convention to set up systems that directly jeopardize the viability of intangible cultural heritage. There must be an element in the ICH Convention that obliges State Parties to act to ensure the viability of the intangible cultural heritage, even in the inventory phase. This element emerges from a combined reading of Articles 2(3) and 11(a). An argument in favour of creating a broad legal and policy framework to which intellectual property law, in its present or future form, belongs comes from these articles. In this way, the ICH Convention does still not touch upon intellectual property law. It only requires the State Parties to adopt the appropriate intellectual property law scheme for the ICH Convention's purposes.

5.2. Intellectual Property Issues as Part of a Policy Framework

A broad policy framework aiming at the viability of fairy tales did not drive the early collectors. The Brothers Grimm placed their engagement in collecting fairy tales and other literature within the framework of their quest into the development of language and various sorts of linguistic phenomena.¹⁴⁵ The collections were a by-product of their research related to language. Having received positive reactions towards their collection of fairy tales from various sides, they decided to continue their process of collecting fairy tales and even older stories and legends.¹⁴⁶ Perrault's interest in fairy tales is related to the education of his children and to his belief that France should develop into a modern nation, something that was only possible by taking folklore, among others, into account.¹⁴⁷ Basile, as a courtier, mainly wrote his fairy tales for performances at the court.¹⁴⁸ Even though these collections contributed to the viability of this specific part of intangible cultural heritage, the collectors' main focus was their contemporary generation and not the one beyond.

The obvious consequence of this emphasis on the contemporary generation is that the collections of fairy tales represented an endpoint. They were not meant to be the starting-point for further action. This is understandable given the private nature of the collections. Nevertheless, the Brothers Grimm tried to spark interest in fairy tales around

¹⁴² See Chapter [Wendland] of the present volume. See also Wend B. Wendland, *Intangible Cultural Heritage and Intellectual Property: Challenges and Future Prospects*, 56 MUSEUM INT'L 97, 99 and 101 (2004).

¹⁴³ See WIPO, *Creative Heritage Project: IP Guidelines for Documenting, Recording and Digitizing Intangible Cultural Heritage*, <http://www.wipo.int/tk/en/folklore/culturalheritage/index.html> (last visited 31 Jul. 2008).

¹⁴⁴ See Chapter [Wendland] of the present volume. See also Wendland, *supra* note 142, at 101.

¹⁴⁵ See KAMENETSKY, *supra* note 9, at 100.

¹⁴⁶ See *id.* at 41-45.

¹⁴⁷ See THE GREAT FAIRY TALE TRADITION, *supra* note 14, at 838-39.

¹⁴⁸ See *id.* at 824-25; Croce, *supra* note 22, at 880-81.

Europe. By corresponding with several scholars, such as Sir Walter Scott, Henry Weber, Peter Christian Asbjørnsen, Jörgen Moe, Berhard Thiele or Stepanovic Karadcik,¹⁴⁹ they encouraged these people to search for their nation's native fairy tales. Many of them were motivated and followed the Brothers Grimm's path. The 1850 edition of the *Kinder- und Hausmärchen* contained a list of all the collections of fairy tales that had come into existence since 1812.¹⁵⁰ This bibliography encompassed several hundred entries. Most of these cited works had given the Brothers Grimm credit for their example either in their preface acknowledgements or in letters.

Whereas the private initiatives furthest extent was nothing more than encouraging other scholars to engage in similar activities, much more is expected from the ICH Convention's inventories. The inventory making process and its outcome is part of a public effort to ensure the viability of intangible cultural heritage, called safeguarding. Within this complex process, inventory making functions as the first step. The inventory only enhances the visibility of the intangible cultural heritage. In turn, visibility becomes viability when inventories join other policies. This is implied in the wording of Arantes when he writes "... in order to be socially sustainable, safeguarding action plans should promote the inclusion of the ICH in public policies".¹⁵¹ Some authors seem to lose focus in this respect. Brown, for example, questions the inventory making as being potentially successful.¹⁵² By first pointing out that "documentation has only a modest role in the preservation of culture,"¹⁵³ his objections become obvious. He further states, "there is obviously nothing harmful about the [ICH Convention]'s ambitious program of cultural documentation, one struggles to imagine how it will protect cultures as living, dynamic systems,"¹⁵⁴ his scepticism towards inventory making is clearly shared.

Brown's scepticism towards inventory making is not only embedded in his distrust for the digital media, but also in his belief that Indigenous people seek either greater secrecy or become anxious about exploitation. What Brown's vision partly lacks, is that inventory making is just one step in the process of safeguarding intangible cultural heritage. The belief that the ICH Convention is flawed, for it tries to reduce heritage to a mere list of items, most likely has its origin in the drafting of the ICH Convention. Indeed, the inventory making is expressly stressed in Article 12(1). The obligation of inventory making is formulated as a hard law provision in the form of a "shall" sentence. The other safeguarding mechanisms are then summed up in Article 13, but not anymore as a "shall" sentence, but as a "shall to endeavor" sentence. The latter is commonly viewed as soft law according to the content. The fact that one of the safeguarding measures is so visually prominent in the ICH Convention definitely impacted perceptions of the ICH Convention.¹⁵⁵ This visually prominent safeguarding measure distracts the attention from the other provisions dealing with

¹⁴⁹ See KAMENETSKY, *supra* note 9, at 27.

¹⁵⁰ See *id.* at 28.

¹⁵¹ Antonio A. Arantes, *ICH Inventories in Context: Purpose, Methodology and Functionality*, at 5 (25-26 March 2007) (paper presented at the conference on *Intangible Cultural Heritage and Intellectual Property under the 2003 Convention: Seeking a Collaborative Interface between ICH and IP*, New Delhi, India) (on file with author).

¹⁵² See Brown, *supra* note 91, at 48. A similar view has been mentioned by Kurin; see Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT'L 66, 71-72 (2004).

¹⁵³ Brown, *supra* note 91, at 48.

¹⁵⁴ *Id.* at 48.

¹⁵⁵ The reason for formulating soft law provisions could be that the ICH Convention, *supra* note 8, is a *general* convention. It does not aim to regulate in detail what every concept means to protect the sovereignty of the State Parties. Therefore, it transfers the further development of what the best safeguarding measures are for their intangible cultural heritage to the State Parties. A critique of this system has been given by Kuruk; see Kuruk, *supra* note 141, at 129-30.

safeguarding. In particular, more attention should be paid to a combined reading of Articles 2(3), 11(a) and 12(1). Based on this combination of articles, we cannot but conclude that the ICH Convention explicitly recognizes that much more has to be done than only inventory making.

Article 12(1) stipulates that the drawing up of one or more inventories has to be done “[t]o ensure identification *with a view to safeguarding*”.¹⁵⁶ Safeguarding is defined earlier in the Convention, namely in Article 2(3). Besides the identification and documentation of intangible cultural heritage, to which inventory making belongs, safeguarding of intangible cultural heritage is also research, preservation, promotion, enhancement, and transmission.¹⁵⁷ Article 11(a) of the ICH Convention, consecutively, makes this safeguarding into an obligation for the State Parties. The different aspects of safeguarding are not further defined in the ICH Convention’s definition of safeguarding, leaving several issues open. For the purposes of the latter mentioned obligations, the inventory becomes an instrument of positive state action. By using the technique of a framework convention,¹⁵⁸ the ICH Convention shifts the burden for this action to the State Parties. They are forced to adopt several legislative approaches. It can be argued that intellectual property law must be one of these legislative approaches.

Wendland’s argument of complementarily action by different regimes is very promising for the project envisioned by the ICH Convention. One of the safeguard measures happens to be protection. What kind of protection is not further stipulated in the ICH Convention, giving an argument that any kind of protection imaginable, including intellectual property law, should be included. At the end, the viability of a certain intangible cultural heritage might be jeopardized when a community cannot react to misappropriation or misuse with a fear that the respective community might abandon its intangible cultural heritage. In this sense, the concept of protection is not only complementary to safeguarding, but also supportive. Without the intellectual property law protection, talking about safeguarding might become obsolete to a certain extent.

6. CONCLUSION

Activities of the Brothers Grimm, who engaged in a project of collecting 200 fairy tales, sparked an interest in this form of intangible cultural heritage all over the world. No one at that time would have dared to think that one and a half centuries after their efforts UNESCO would set up a legal instrument, the ICH Convention, putting the Brothers Grimm’s activities in a broader perspective of safeguarding. At the same time, the most eye-catching obligation for State Parties in the ICH Convention resembles the Brothers Grimm’s activities. State Parties must inventory their intangible cultural heritage. In this perspective, this Chapter has explored this new standard setting instrument in the light of the early intangible cultural heritage collections and the activities surrounding these collections.

This explorative exercise reveals that the ICH Convention affords State Parties a considerable amount of freedom in framing their national legislation. This discretion led to

¹⁵⁶ ICH Convention, *supra* note 8, art. 12(1) (emphasis added).

¹⁵⁷ ICH Convention, *supra* note 8, art. 2(3).

¹⁵⁸ As we have just indicated, the ICH Convention, *supra* note 8, evolved as a general text with only a few specifications. The other specifications need to be either developed in the operational directives, national legislations or other treaties. The Operational Directives, *supra* note 29, ¶ 77, cover some of duties of State Parties in relation to their national inventories and the safeguarding measures that should be developed based on that information. However, intellectual property law issues are not part of. Hence, they will most likely have to be addressed in national legislations or another international treaty.

the conclusion that 200-year-old practices of safeguarding intangible cultural heritage are still possible under the ICH Convention. Hence, the State Parties may disregard communities in various respects. Their involvement should not necessarily be pursued. Prior and informed consent does in principle not have to be obtained for the inventory making. Besides this, nothing is stipulated about the scope of the inventory, implying that it can be minimalistic, maximalistic or anything in between. Similarly, the ICH Convention is silent about intellectual property law issues, leaving the possibility to the State Parties to provide no protection at all, stick to their existing intellectual property law or to customize their intellectual property law to the specific needs of the intangible cultural heritage.

Legal flexibility offered by the ICH Convention should not necessarily be regarded as a negative point. Within 19 months after its adoption, the ICH Convention entered into force. 30 States ratified the ICH Convention by 20 January 2006. A rigid working framework could have made the ICH Convention less attractive to these ratifying States. Various reasons may be cited for this. Safeguarding techniques vary according to the intangible cultural heritage. Further, political and cultural sensitivities within a State Party may require the necessary flexibility to develop appropriate safeguarding schemes. State Parties have also different financial abilities for safeguarding. All this calls for a framework convention, what the ICH Convention is.