**Chengdu International Conference on Intangible Cultural Heritage   
in Celebration of the Tenth Anniversary of UNESCO’s Convention   
for the Safeguarding of the Intangible Cultural Heritage**

**Chengdu, China, 14 to 16 June 2013**

**Round-table 3: Parallel universes:   
intellectual property, world heritage and cultural goods and services**

**Introduction**

During the first decade of life of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, developments continued simultaneously in three adjacent spheres of international cooperation: a) efforts spearheaded by the [World Intellectual Property Organization (WIPO)](http://www.wipo.int/tk/en/) to accord protection to traditional knowledge, genetic resources and traditional cultural expressions based on intellectual property principles, b) on-going implementation on a global scale of the 1972 [Convention concerning the Protection of the World Cultural and Natural Heritage](http://whc.unesco.org/), and c) the adoption and entry into force of the 2005 [Convention on the Protection and Promotion of the Diversity of Cultural Expressions](http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/). Even if the four may sometimes seem to inhabit separate and parallel universes, there are in fact a number of convergences among them and many reciprocal effects of one on another. This panel seeks to explore the symbiotic and reciprocal relations between and among them, looking at how the evolution of each since 2003 has also influenced the evolution of the others. The brief notes below examine in particular how each approaches two key concepts: ‘community’ and ‘value’.

**Developing an intellectual property regime for traditional knowledge, genetic resources and traditional cultural expressions**

Questions concerning intellectual property rights had an important part in UNESCO’s discussions on conservation of culture since the early 1950s. In 1973, when the [Bolivian authorities proposed to the Director-General](http://unesdoc.unesco.org/images/0000/000058/005845eb.pdf) that the Intergovernmental Copyright Committee consider the question of establishing an ‘international instrument for the protection of folklore’, the measures they advocated for consideration included some that now fall within the safeguarding scope of the 2003 Convention (e.g. ‘preservation, promotion and diffusion’) and others that focussed on protecting folklore expressions as intellectual property – in their conception at the time, seen as the property of the State. As these two approaches were increasingly in subsequent years considered to require distinct responses, the question of intellectual property protection was taken on by WIPO, and the 2003 Convention specifically excludes intellectual property from its scope.

Established in 2000, WIPO’s [Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)](http://www.wipo.int/tk/en/igc/) has since been debating provisions that could figure into one or more international legal instruments aiming to ensure effective protection of those three closely related but distinct domains. For the present purpose, let us consider its actions concerning ‘traditional cultural expressions’ or ‘expressions of folklore’ (synonyms in WIPO’s usage). From the beginning, the difficulty arose of how an international intellectual property system that had evolved over centuries aiming to protect the unique creative expressions of known persons could embrace dynamic cultural expressions that have ancient roots but are created and recreated by communities and groups and regarded as collectively ‘owned’. Very soon, the WIPO negotiations focused on *sui generis* (special) provisions, based on intellectual property principles but which are adapted to respond to the particular features of traditional cultural expressions. Within its current draft provisions, the IGC refers to ‘indigenous peoples and communities and traditional and other cultural communities and their members’, although each of these terms is contested and – as with the 2003 Convention – there may never be a strict definition of ‘communities’. Elsewhere, reference is made to ‘indigenous [peoples] and local communities’, with the brackets indicating lack of full consensus on the terminology.

The question of value also figures centrally into the work of the WIPO IGC. The clearest expression of its thinking comes in the set of draft ‘objectives’ that introduce the current set of provisions on traditional cultural expressions ([WIPO/GRTKF/IC/25/4](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_25/wipo_grtkf_ic_25_4.doc)), in which it is stated that ‘The protection of traditional cultural expressions should aim to […] recognize that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values’[[1]](#footnote-1). Although these objectives are still at a ‘first draft’ stage, and have not yet been negotiated, they clearly place the emphasis on the communities’ own valuation of their heritage and its importance to them. The larger debate rests on the question of how best to ensure on the one hand that the communities’ values are not violated through misuse, and on the other hand that when value is added through dissemination or other use, they are the ones who benefit.

WIPO’s intergovernmental negotiations had already anticipated many of the concerns with the rights of indigenous peoples that were finally enunciated in the 2007 [United Nations Declaration on the Rights of Indigenous Peoples](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf‎), but it, more so than the pre-existing UNESCO Conventions, has since 2007 fully integrated the principles set out there, particularly in Article 31: ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.’ Comprehensive integration of the Declaration remains a challenge facing the three UNESCO Conventions.

**Bringing local values and local communities into World Heritage**

The 1972 [Convention concerning the Protection of the World Cultural and Natural Heritage](http://whc.unesco.org/) has continued to thrive during the first decade of the 2003 Convention, attaining almost universal ratification by the States of the world. Cultural and natural heritage protected by the 1972 Convention is limited to properties that meet the threshold of Outstanding Universal Value and are suitable to meet one or more of the criteria specified in the Convention’s Operational Guidelines. Inherent in this language when it was adopted was the conception that ‘parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage … as a whole’ (Preamble), and that such value is determined not by the communities residing in or making use of a site, but by an external process of assessing its uniqueness and relevance within a global context.

In 1994, the World Heritage Committee launched the Global Strategy for a Representative, Balanced and Credible World Heritage List. As explained in the report of an expert group at the time, the Committee was called ‘to take into account all the possibilities for extending and enriching [the List] by means of new types of property whose value might become apparent as knowledge and ideas developed. The List should be receptive to the many and varied cultural manifestations of outstanding universal value through which cultures expressed themselves’ ([WHC-94/CONF.003/INF.6](http://whc.unesco.org/archive/global94.htm#debut)). Over the following years – and even as the 2003 Convention was being drafted – the World Heritage Committee continued to debate a more inclusive World Heritage List and a more expansive interpretation of Outstanding Universal Value, as summarized in the 2003 conference and document, ‘[Linking Universal and Local Values: Managing a Sustainable Future for World Heritage](http://whc.unesco.org/en/series/13/)’ that served as a capstone to the Strategy’s first decade.

This opening up continued in parallel with the adoption and entry into force of the 2003 Convention. Discussions within the Committee and the larger World Heritage community continued to focus on the fullest possible involvement of the communities residing in or near sites or utilizing them for diverse purposes. In 2007 the World Heritage Committee adopted its [Decision 31 COM 13A](http://whc.unesco.org/en/documents/9192), ‘recognizing the critical importance of involving indigenous, traditional and local communities in the implementation of the Convention’ and deciding ‘to add “communities” as a fifth strategic objective’ to complement credibility, conservation, capacity building and communication that had been adopted in 2002 ([Decision 26 COM 17.1](http://whc.unesco.org/en/decisions/814/)).

As communities became recognized as pivotal in the management and conservation of World Heritage sites, their issues and concerns also began to take various positions closer to centre stage. This trajectory was widely referred to within the framework of the 40th anniversary of the 1972 Convention in 2012, focussing on the theme ‘World Heritage and Sustainable Development: the Role of Local Communities’. Finally, and as a result of the discussions throughout the year of celebrations, the [Kyoto Vision](http://whc.unesco.org/uploads/news/documents/news-953-1.doc) encouraged the international community to strive to ensure effective involvement of local communities, indigenous peoples, experts and youth in all aspects of World Heritage conservation.

**Promoting the diversity of cultural expressions**

The third parallel domain of action is the subject of the 2005 [Convention on the Protection and Promotion of the Diversity of Cultural Expressions](http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/). That Convention is concerned with promoting favourable conditions for cultures to flourish and to interact and for cultural creativity to thrive, particularly through policies and measures that recognize ‘the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning’ (Article 1). The Convention is careful to distinguish the social and cultural value of such expressions and activities from their commercial value, in that regard finding common ground with WIPO’s enumeration of ‘social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values’ (see above). Yet the 2005 Convention, as an instrument of sustainable development, also seeks to ensure that the creators of cultural expressions can benefit effectively and equitably when cultural activities, goods and services enter the stream of commerce.

Where the 2003 Convention speaks of ‘communities, groups and, in some cases, individuals’, the 2005 Convention speaks in mirror image of ‘individuals, groups and societies’ (Article 4.3), emphasizing the role of ‘artists and others involved in the creation of cultural expressions’ (Article 6.2 (g)). The closest counterpart to the 2003 Convention’s ‘communities’ are what the 2005 Convention refers to as ‘social groups’, who are seen – together with individuals – as entitled to ‘create, produce, disseminate, distribute and have access to their own cultural expressions’ and to have access to diverse cultural expressions other than their own (Article 7). The emphasis here is then on the value that individuals and groups attach to cultural expressions – whether their own or those of others – but neither on a notion of universal or outstanding value, as in the 1972 Convention, nor on one that gives primacy to the value that communities assign to their own heritage (even while respecting the heritage of others), as in the 2003 Convention. (The 2003 Convention notably balances the goal of ensuring access to cultural expressions with that of respecting customary practices governing such access, thereby finding common ground with the WIPO efforts to protect secret or sacred knowledge.)

Particularly in its preamble, the 2005 Convention evokes values that are shared with the 2003 Convention and with WIPO’s efforts concerning traditional knowledge and traditional cultural expressions and points to the common engagement of all three to promote sustainable development. It thus takes into account the ‘importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development’ (Preamble). One can indeed imagine countless examples of cultural expressions that fall simultaneously within the ambit of WIPO, the 2005 Convention and the 2003 Convention and the 1972 Convention, even if each of them would approach a given expression from different perspectives and with different, albeit complementary, objectives in mind.

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One might imagine these four realms as planets within a single solar system but circulating on elliptical orbits – coming closer together from time to time, the gravity field of one perhaps perturbing another as they pass, occasionally aligned, but more often pursuing their own orbital paths. In the decade since the Convention for the Safeguarding of the Intangible Cultural Heritage was adopted by the UNESCO General Conference on 17 October 2003, each of the four has continued its evolution and pursued its mission, even while necessarily being influenced – in greater or lesser degree – by the others. States Parties to one or several Conventions, as well as Member States of WIPO, balance their sometimes complementary and sometimes contrasting scopes and purposes, integrating each of them into national legislation and policy frameworks and bringing their experience with one to bear on their implementation of the other. Whether the coming decades see more frequent convergences or fewer rests in the hands of those States.

1. These principles were presented to the eighth session of the IGC in 2005 and have since been labelled with the notation, ‘to be discussed at a later stage’ ([WIPO/GRTKF/IC/25/4](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_25/wipo_grtkf_ic_25_4.doc)); in the case of protection of traditional knowledge, the latest revision of the provisions sets ‘economic’ and ‘commercial’ in brackets, indicating that there are divergent views on whether they should be retained or deleted. [↑](#footnote-ref-1)