



# Protection of Intellectual Property Rights for the ICH Practitioners

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## I. Introduction

The Convention for the Safeguarding of the Intangible Cultural Heritage ('ICH Convention' or 'Convention' hereafter) was adopted in 2003 and subsequently brought into force in 2006. The ICH Convention mandates signatories to use or mobilise various measures to safeguard intangible cultural heritage.

Even though the Convention does not succinctly mention the elaborate legal measures for safeguarding intangible cultural heritage, the intellectual property rights to protect intangible cultural heritage and its holders are implied throughout provisions of the Convention. To implement the Convention's spirit, the Operational Directives clarify legal form as safeguarding measures by stating that:

[S]tate Parties shall endeavor to ensure, in particular through the application of intellectual property rights, privacy rights and any other appropriate form of legal protection, that the rights of the communities, groups, and individuals that create, bear and transmit their intangible cultural heritage are duly protected...<sup>1</sup>

Intellectual property rights as a form of legal protection in the area of intangible cultural heritage have long been discussed during various occasions along with tangible cultural heritage. However, there are many obstacles on the road to vesting property rights in the specific cultural heritage.

Intangible cultural heritage is a type of cultural heritage that does not have substantive or touchable objects. In order to grant a legal right to someone, contemporary legal principles of intellectual property demand a tangible object in general, among many other elements, whereas intangible cultural heritage in its nature does not have the one.

Even though rights of intellectual property are recognised in intangible cultural heritage and thus can vest in the owner of it, it is still unclear who would be the owner of the rights since in many cases it is very difficult to specify the owner(s) of intangible cultural heritage.

Intellectual property rights are a relatively newly developed legal concept compared to traditional real or personal property rights. The theories of intellectual property rights have been evolved mainly in the European culture; therefore, together with a short history of practice of such kind of law, the rest of the world benchmarked European intellectual property laws without enough time or opportunity to develop their own legal theories or accumulate practices to evolve them to their own customary laws.

In these days, most intellectual property rights are governed by statutes. Rooms for customary laws are too small to settle in them. Statutes stipulate well-defined elements of intellectual property rights for claim or protection as if they have a well-constructed fortress that hardly accommodates strangers. In this situation, the Convention requires respective signatories to secure intellectual property rights for communities, groups and individuals to pave the way for safeguarding intangible cultural heritage.

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1) Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage adopted by the General Assembly of the States Parties to the Convention at its second ordinary session (Paris, France, 16 to 19 June 2008), amended at its third session (Paris, France, 22 to 24 June 2010) para. 104.

## II. Intellectual Property Rights in General

Intellectual property as a legal term refers to some distinctive types of creations of mind that traditionally include three areas—patents, trademarks, and copyrights. Under intellectual property law, an owner may be granted exclusive rights to his intangible assets expressed by various forms of work such as music, literature, or fine art, among others.

### (a) Patent

A patent is granted to a person who invents or discovers any new and useful process,<sup>2</sup> machine, manufacture, composition of matter, or any new and useful improvement thereof.<sup>3</sup> The person, who is called the potential patentee, must demonstrate what he had done by the patent application in order to obtain a patent.

The application contains specification and claims. The specification is to describe how the invention works. The claims are to point out the patentability of specification. If a patent is granted, the patentee will have an exclusive right to make, use, offer to sell, or sell the invention to others.<sup>4</sup>

In order to be patentable, an invention must meet statutory standards. Basic requisites are the novelty and non-obviousness of the invention. Novelty means that an invention must not be found in prior art.<sup>5</sup> Non-obviousness means that the invention must be different from the prior art in a meaningful way.<sup>6</sup>

In order to satisfy the novelty requirement, an invention must not be similar to the public knowledge or use whereas for the non-obviousness requirement, the

2) The term 'process' in this context means process, art, or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material. See 35 U.S.C.A. § 100.

3) 35 U.S.C.A. § 101.

4) See 35 U.S.C.A. § 154(d).

5) In the case of copyright, it merely requires originality that the copyrighted work should not be the copy of others. Novelty means in a simple word it should be 'new' to be patentable. There are detailed legal descriptions for an invention to be 'new.' See 35 U.S.C.A. § 102.

6) 'A patent may not be obtained ... if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made...' See 35 U.S.C.A. § 103.

invention must be sufficiently different from the prior art. Because of these two requirements for a patent, obtaining patent protection is much more rigorous than protections of other intellectual property rights. However, even after obtaining a patent, the patent is often times challenged and invalidated by courts.

There are three types of patents: utility patents, plant patents, and design patents. Utility patents are known as ‘patents for invention’. In general, a utility patent protects the way an invention is used and works. Utility patents may be granted to a person for an invention of the new and useful process, machine, manufacture, or composition of matter, or new and useful improvement thereof. The term of this type of patent in the United States is twenty years from the date of patent application filing. During this period, its owner can exclude others from others making, using, or selling the invention.<sup>7</sup>

Plant patents are granted to an inventor who invented or discovered and asexually reproduced a distinct and new variety of plant. The granted protection lasts for twenty years from the date of filing the application.<sup>8</sup> Design patents are granted to an inventor who invented any new, original, and ornamental design for an article of manufacture.<sup>9</sup> A design patent protects only the appearance of the article and not structural or utilitarian features. Design patents are protected for fourteen years from the date of grant.<sup>10</sup>

## **(b) Trademark**

The term trademark includes any word, name, symbol, or device, or any combination, used or intended to be used, in commerce to identify and distinguish the goods of one manufacturer or seller from goods manufactured or sold by

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7) See 35 U.S.C.A. § 161. See also U.S. Patent and Trademark Office (PTO) website of <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/patdesc.htm> <visited 11/07/2011>. Approximately 90% of the patent documents issued by the U.S. PTO in recent years have been utility patents.

8) See 35 U.S.C.A. § 161. See also U.S. PTO website of <http://www.uspto.gov/web/offices/pac/plant/#1>. <visited 11/07/2011>.

9) See 35 U.S.C.A. § 171.

10) See 35 U.S.C.A. § 173.

others, and to indicate the source of the goods.<sup>11</sup> Examples would include a brand name like 'Coca-Cola' for the carbonated beverage or 'Dell' for a computer.

Trademark laws in general have three main objectives: (1) protecting the good will and reputation of sellers; (2) preventing consumer confusion or deception about who produced the goods or service they have purchased; and (3) promoting competition in the market.<sup>12</sup>

The basic nature of trademark ownership is use of that mark in commerce.

[T]rademarks help consumers to select goods. By identifying the source of the goods, they convey valuable information to consumers at lower costs... The trade mark is a valuable asset, part of the 'goodwill' of a business... The value of a trademark is in a sense a 'hostage' of consumers: if the seller disappoints the consumers, they respond by devaluing the trademark.<sup>13</sup>

In order to be registered and protected as intellectual property, a trademark should be distinctive. The distinctiveness test is somewhat subtle but it should anyhow be distinctive rather than arbitrary, suggestive, or fanciful. A trademark also should not use a generic name indicating a product name or category such as 'apple' for an apple or 'hard liquor' for whiskey as well as a descriptive term indicating its own nature, for example, 'salty' salt or 'sweet' candy.

With regard to the ownership of a trademark, a person who has bona fide intention, under circumstances showing the good faith of such a person, to use a trademark in commerce may request registration of its trademark on the principal register...<sup>14</sup> As such, a trademark protection vests in a person who intends to use it commercially. The duration of trademark registration is ten years. It may be renewed in ten-year periods indefinitely, provided that the trademark is still in use at the time of expiration.<sup>15</sup>

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11) See 15 U.S.C.A. § 1127. See also U.S.PTO website of <http://www.uspto.gov/trademarks/process/index.jsp> <visited 11/07/2011>. Service mark is also defined similarly but in the United Kingdom, it was merged into the trade mark while the United States laws distinguish them.

12) See GARY MYERS, PRINCIPLES OF INTELLECTUAL PROPERTY LAW (2008) at 162.

13) Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423 (7th Cir. 1985).

14) See 15 U.S.C.A. § 1051(b).

15) See 15 U.S.C.A. § 1058.

## (c) Copyright

Copyright is a personal property right that protects the exclusive right of authors of literary, dramatic, musical, artistic, etc. works. Statutorily protected works are categorised as: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audio-visual works; (7) sound recordings; and (8) architectural works.<sup>16</sup> Separate copyright also subsist in secondary-works such as films, soundings, and broadcasts.

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.<sup>17</sup>

Copyrightable work is explained that '[t]he *sine qua non*<sup>18</sup> of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.'<sup>19</sup> Therefore, a copyrightable work must show two elements: originality and a minimal degree of creativity.

Copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.<sup>20</sup>

While an idea is not copyrightable, an expression of the idea is copyrightable.<sup>21</sup> Copyright does not protect functional features. Therefore, if design elements merge into an aesthetic function, they are not separable for copyright protection. The

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16) See 17 U.S.C.A. § 102(a).

17) Id.

18) These Latin words can be translated into English as 'essential condition or requirement.'

19) Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) para. 10.

20) See 17 U.S.C.A. § 102(b).

21) Einstein's relativity theory itself is not copyrightable but if he authors a book about it, the book can be protected by the copyrights law.

following are some samples of works not subject to protection: words and short phrases such as names, titles, and slogans; plans; devices; blank forms; works consisting entirely of information that is common property;<sup>22</sup> and typeface.<sup>23</sup>

Copyrightable work should be fixed in a tangible medium of expression as mentioned above. It is said that '[a] work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.'<sup>24</sup>

The meaning of 'fixation' is explained as follows: if the work is being made simultaneously with its transmission, a work consisting of sounds, images, or both that are being transmitted, it is considered 'fixed' for purposes of the copyright law.<sup>25</sup> That is, as soon as a copyrightable work is expressed in a tangible medium, its protection automatically ensues.

Computer programs are considered writings and thus copyrightable if they have sufficient originality and authorship. Sound recordings, such as music, are copyrightable. Composers, producers, and performers of music are generally protected by copyright law. Derivative works are also protected.<sup>26</sup> A public performance of copyrightable works is also protected.<sup>27</sup>

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22) Examples of such works are standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources etc. See 37 C.F.R. § 202.1

23) See 37 C.F.R. § 202.1.

24) 17 U.S.C.A. § 101.

25) Id.

26) Statutory definition of a 'derivative work' is so broad. It is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatisation, fictionalisation, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. See 17 U.S.C.A. § 101.

27) Protected public performances are literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. See 17 U.S.C.A. § 106(4).

### III. Identifying Ownership of Intangible Cultural Heritage<sup>28</sup>

Practitioners are those who practice intangible cultural heritage. They may be an individual member of a community or group or an independent individual practitioner. They may be referred to the whole community or group as a unit. Intellectual property rights vest in the owner who may be a natural or legal person. Multiple owners can have rights over their single intellectual property. As to intangible cultural heritage, identifying the owner of a specific intangible cultural heritage is the first step to seek for protection of intellectual property rights if a right or rights can be granted to the owner. This question goes to who the owner of intangible cultural heritage is in the end.

#### A. Ownership of Intangible Cultural Heritage

A confusing term within the realm of discussion regarding intangible cultural heritage is ‘heritage’. Heritage may be contradictory to the conception of intellectual property rights whose tests are novelty in patents, distinctiveness in trademarks, and originality in copyrights in general. There might not be room for ‘heritage’ to nestle in the tests of the intellectual property rights that require freshness or originality.

Generally speaking, heritage means the inheritance of a proprietary right or value from a person who has already passed away. It is sometimes used with a modifying word such as ‘spiritual’ heritage in order to stress non-material inheritance; however, it does not have legal meaning if someone inherits something that does not accompany substantive rights. For example, even though descendants have inherited Picasso’s genius in art or Hegelian dialectic idea from their ancestors, they are far from being an object for legal protection.

Similarly, in the case that communities, groups or individuals inherit intangible assets from their ancestors, it is clear that these assets are not the ones to be

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28) The vast majority of this chapter is a loan from an article titled ‘Issues of ICH Communities Involving the Protection of Intellectual Property Rights in the ICH Field’ authored by Pilho Park and published by ICHCAP (Intangible Cultural Heritage Center for Asia-Pacific) with the book title of the *Safeguarding of Intangible Cultural Heritage & Intellectual Property Rights: Trend and Challenges* as the 2010 Expert Meeting Report in 2010.



protected by substantive laws or precedent case laws. As to intangible heritage, it does not have practical prerequisites to get under the legal umbrella since the owner of it is not identified, and even if ownership is recognised, it lacks basic legal conditions to be a heritage since there does not exist an expressed devise, bequest, or familial relationships. Therefore, the term heritage is nothing more than a rhetoric that does not imply legal meaning in its word itself.

The fact that intangible cultural heritage is out of the legal umbrella means it is a kind of public good laid in the realm of the public domain. Public goods are something that can be shared freely such as air or natural water. Even if someone wrote a book after citing certain historical facts from the Official Records of the Yi Dynasty of Korea, it would not be an infringement of copyrights. The same is true of someone who sings 'Arirang', a popular Korean folk song, in a theatre for the audience who bought admission tickets. It is because these goods are in the public domain. On the other hand, some people make money from exploiting such public goods<sup>29</sup> or obtain exclusive rights through patent application.<sup>30</sup>

Contrary to reality, communities, groups, and individuals as entities that hold, maintain, and sustainably develop intangible cultural heritage are not legally protected, as no legal rights have been granted to them. Should they be satisfied with being successors of the traditional culture who hold and practice intangible cultural heritage while some general people make good businesses or garner their fame by commercially exploiting intangible cultural heritage?<sup>31</sup> If this situation goes on, many members of communities and groups as well as individuals who are

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29) American duet Simon and Garfunkel had made a lot of money from their song 'Scarborough Fair', which was lessoned from an England musician who had no right to the song since the song was considered a folk song within the realm of the public domain. The same is true for a Korean folk song named 'Han O Baek Nyeon', which was sung by Yong Pil Cho, a popular singer in Korea.

30) In 2001, two Indian nationals applied for a patent in the United States for a plant named 'tumeric' which has been used for treating some diseases. The patent was granted but it was canceled later after a relevant Indian authority for preserving traditional knowledge raised a question about its novelty. See WORLD HEALTH ORGANIZATION, Regional Consultation on Development of Traditional Medicine in the South-East Asia Region, Pyongyang, DPR Korea, 22-24 June 2005 By Mr. V.K. Gupta. 1. [http://www.searo.who.int/linkfiles/meetings\\_document16.pdf](http://www.searo.who.int/linkfiles/meetings_document16.pdf), <visited on 10/05/2010>. In this case, the reason for cancellation was not to protect a traditional knowledge; rather, it was lack of novelty. Anyhow, the traditional knowledge was benefited indirectly.

31) In Australia, through an amendment of law recently, if a performer of folklore was not compensated at the time his performance was recorded, he is entitled to the copyright in part over the recorded performance. This legislation is a good sign of progress in recognizing intellectual property rights in intangible cultural heritage. See T. Janke, 'Indigenous Intangible Cultural Heritage and Ownership of Copyright' in T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* at 170, 2009.

directly related to intangible cultural heritage may be apart from their position. If so, the traditional heritage will eventually fade out by losing the opportunity of smoothly succeeding to the next generation.

Culture itself belongs to the public domain that cannot be a part of private property. However, individual pieces of work that consist of overall culture can be private property, even though it consists of a part of the public domain, once it is consistent with legal conditions to be a private property. In doing so, there must be novelty, distinctiveness, or originality as prerequisites in order to have intellectual property rights.

The ICH Convention was born with the spirit of recognising ownership in intangible cultural heritage through its making of an environment to prepare basic legal conditions for intellectual property rights.<sup>32</sup>

## **B. Ownerships for Community Practitioners**

Recognition of ownership itself is not a critical issue in modern intellectual property law. Ownership of an intellectual property right lies on the ‘person’ who insists it until it is declared by the court. ‘Person’ can only be an owner of an intellectual property along with ownership of any other property regardless of whether the person is natural or legal. In some cases, a de facto legal person that is short of being a full legal person can be an owner of property. In this stage, a somewhat complicated question arises when the two different conceptions—ownerships of intellectual property rights and intangible cultural heritage—are mixed.

So who could own intangible culture; should it be possible to own it? Would it be possible that all residents of Jeongseon county can own the copyrights to Jeongseon ‘Arirang’, one of several versions of Arirang? Would it be possible that every national of Swaziland can own intellectual property rights to the ‘Reed Dance’ festival in which all unmarried women above fourteen participate? This issue reverts back to the question of how the term ‘communities’ is defined.

UNESCO’s definition of ‘communities’ is so vague that no clear understanding exists. The reason UNESCO was unable to clearly define the term may be imputed

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32) See ICH Convention section III art. 11~18.

to the fact that so many diverse cultures exist. Therefore, it may not be easy for UNESCO to define the term 'culture' properly. However, maintenance and development of intangible cultural heritage will not be made if a certain type of ownership is not recognised for the heritage. Considering this, a proper definition of 'communities' must be made in order to ascertain elements of communities. This may be the safeguarding spirit of the ICH Convention.

Based on the spirit of the ICH Convention, the most effective way to preserve, maintain, and develop intangible cultural heritage may be to obtain the status of a legal person.<sup>33</sup> 'Communities' may obtain the status of a legal person by way of: (1) a legislative action in a state where the 'communities' belongs;<sup>34</sup> (2) a judgment through the interpretation of relevant law; or (3) the formation of a corporation or organisation by themselves. There may be another way to have ownership without being a legal person. It could be a type of common ownership by all members of a specific community.<sup>35</sup> However, since this method will undeniably bring out a plethora of complicated legal issues, it may not be the best to pursue.

More ideas remain. The first issue involves how to recognise members of a community. The larger the members of a community, the more difficult it becomes to confirm membership. If a community is a huge one, such as a city or region (i.e. Gangneung City in Korea for the Gangneung Danoje Festival), it is certainly not easy to name every member of the community. In the process of confirming members, basic guidelines suggested by UNESCO such as 'a shared historical relationship' and a 'network' of 'people whose sense of identity and connectedness' will be helpful. However, since these guidelines are still so vague, detailed criteria should be made by the preparatory organ or supporting authority for forming the legal personality of a community. The ICH Convention, in fact, recommends such

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33) There are some different voices opposing UNESCO's initiative for intellectual property rights in intangible cultural heritage. For details, see T. Kono, 'Convention for the Safeguarding of Intangible Cultural Heritage: Unsolved Issues and Unanswered Questions' in T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* at 35, 2009.

34) See ICH Convention of 2003 art. 13(d). In this clause, the Convention recommends signatories to take necessary legal measures for safeguarding intangible cultural heritage.

35) As to multiple persons' ownership, there are 'tenancy in common' and 'joint tenancy' in common law, which both have undivided common ownership with other(s). If, for instance, ten persons own a property together through joint tenancy or tenancy in common, all ten persons have full ownership over the property undividedly at the same time rather than have one-tenth of a portion respectively. This form of ownership may be good for 'groups' rather than 'communities' since the latter may have too many members as owners.

efforts to Member States.<sup>36</sup>

After earning legal person's status, a community may encounter demanding work in order to maintain legal person's status. There should be a general meeting of all members, board of directors and officers to conduct businesses. It may be costlier than it was during the time of holding non-legal person's status in addition to facing more complex legal questions than before while following the recommendation from the ICH convention for safeguarding. However, such costs should be considered a natural cost for holding and maintaining intellectual property rights. In a nutshell, while having premature safeguarding measures, the first thing to do is to obtain legal person's status if relevant laws allows.<sup>37</sup>

### C. Ownerships for Group and Individual Practitioners

In the case of a smaller community, the question becomes how to obtain a legal person's status in relation to intangible cultural heritage or if they can even be recognised as an owner of intellectual property. The 'communities' example may be applicable to the case of 'groups' in the same manner; otherwise, it can apply for the conception of 'tenancy in common' or 'joint tenancy' as a form of ownership in intellectual property in relation to intangible cultural heritage.<sup>38</sup> For the 'individuals' case, there are not any legal barriers for a natural person to be an owner of intellectual property. The only question, along with other entities, is whether an individual can be an owner of a specific intangible cultural heritage by negating characteristics of the public goods in the heritage.

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36) See ICH Convention art. 13.

37) As to how to recognise intellectual property rights in intangible cultural heritage, one is criticising the present approach through a modern legal theory, which is allegedly Western Europe-oriented. However, he does not alternatively offer viable propositions. See I. Mgbeoji, 'On the Shoulders of the 'Other'ed': Intellectual Property Rights in Intangible Cultural Heritage and the Persistence of Indigenous Peoples' Texts and Inter-Texts in a Contextual World' in T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* at 210 and 220, 2009.

38) The two types of common ownership have somewhat differences in the degree of intimacy between or among common owners, relationship to the third party, and inheritance, among other things. Such differences should be discussed when there is a detailed study for ownership of intangible cultural heritage.

## IV. Protecting Practitioners' Rights in Intangible Cultural Heritage

The application of intangible cultural heritage to the contemporary intellectual property regime is one of the toughest jobs in the mission of safeguarding ICH. In order to protect intellectual property rights, the rights must vest in practitioners as owners. In order for rights to vest in practitioners, several requisites required by laws should be overcome. Legal requisites such as novelty, distinctiveness, or originality are so rigid to apply to intangible cultural heritage. However, several efforts have been made in some countries and international organisations as well as non-governmental organisations. These efforts are mainly found in areas of traditional knowledge and traditional cultural expressions or expressions of folklore.

### A. Traditional Knowledge

Traditional knowledge can be defined as a kind of knowledge held by indigenous people of a particular community. It also refers to: 'traditional-based literary, artistic, or scientific works; performances; inventions; scientific discoveries; marks; names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.'<sup>39</sup>

For many communities, traditional knowledge forms part of a holistic worldview and is inseparable from their very ways of life and their cultural values, spiritual beliefs, and customary legal system.<sup>40</sup> It was sometimes misappropriated by so-called advanced societies for their benefits by isolating the working principle of a traditional medicine and patented it.<sup>41</sup>

These days, holders of traditional knowledge are confronted with various difficulties to maintain and transmit the knowledge. The primary difficulties largely

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39) WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) at 25.

40) WIPO, Intellectual Property and Traditional Knowledge at 1.

41) See supra note 30.

come from short or lack of relevant policy or legal system for the protection of traditional knowledge at both national and international levels even though several policy frameworks have been made in relation to protecting traditional knowledge at the international level.<sup>42</sup>

Because of external, social, and environmental pressure, more difficulties come from the fact that people in communities migrate, encroach on the modern lifestyle, and disrupt traditional ways of life. Thus, traditional knowledge is being endangered. In addition, traditional knowledge holders' lack of systematic knowledge about theirs is another fact for facing difficulties. In many cases, they do not know how to isolate chemical compounds from the object they are using for healing in a traditional way. Moreover, their knowledge is sometimes commercially exploited.<sup>43</sup>

In order to protect traditional knowledge, a certain policy or law must recognise property rights over traditional knowledge holders first. This may be called a positive method of protection. After the rights are vested in them, the holders may have legal a remedy against infringement of the property rights. This may be called a defensive method. Effective protection of traditional knowledge requires combination of the two methods.

#### (a) Sui generis

Sui generis<sup>44</sup> aspects of intellectual property law can be a measure for protection of traditional knowledge. Sui generis in intellectual property law is an extended term of a traditional legal regime to protect rights that fall outside traditional intellectual property doctrines. Therefore, a sui generis system, if recognised, can give intellectual property rights to the holder of traditional knowledge. A number of countries have already adapted sui generis measures to the existing intellectual property law system. For example, China has recognised a

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42) Convention on Biological Diversity of 1992 and UN convention to Combat Desertification of 1994 by UNEP, Primary Health Care Declaration of Alma Ata of 1978 by WHO, Agreement on Trade-Related Aspects of Intellectual Property by WTO, International Undertaking on Plant Genetic Resources of 1983 by FAO, and many activities by WIPO were made among many other efforts.

43) See supra WIPO Report at 7-8.

44) Sui generis means 'of its/his/her/their own kind or unique'.

traditional method of diagnosis and treatment in Chinese traditional medicine as a way of granting a patent.<sup>45</sup>

## (b) Fair competition

Unfair competition in a legal sense is a wrongful business practice that any person in connection with any good or service uses any word, term, name, symbol, device, false designation of origin, or false or misleading description of fact that can cause confusion or mistake. Unfair competition is comprised of torts that cause an economic injury to a business through deceptive or wrongful business practice.<sup>46</sup>

If any person is doing business with a false or misleading claim that a product is authentically indigenous or has been produced or endorsed by, or otherwise associated with, a particular community, group, or individual, the aggrieved party can seek for a legal remedy.

## (c) Confidentiality and trade secrets

A trade secret is confidential information that has commercial value but is not generally available to the public. It can be the form of formula, practice, process, design, instrument, pattern, or compilation of information. If someone steals, takes, carries away or conceals, copies, duplicates, etc. without authorisation, it constitutes a crime.<sup>47</sup>

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45) See Regulations of the People's Republic of China art. 23. Sui generis measures tend to be more used to protect traditional knowledge of tangible cultural heritage than intangible one even though demarcation between tangible and intangible are subtle. United States recognises American natives' insignia through a Database of Official Insignia of Native American Tribes and prevents others from registering these insignia as trademarks in the United States. See <http://www.uspto.gov/trademarks/law/tribal/index.jsp> <visited 11/11/2011>. See also New Zealand's Trade Act of 2002 art. 19 stating that if a person applies for registration of a sign as a trade mark and the sign contains the name or representation of a person, the trademark authority may require the written consent from relevant person who is implied as the Maori authority.

46) See 15 U.S.C.A. § 1125(a).

47) See 18 U.S.C.A. § 1832.

Laws of confidentiality and trade secret can be used for protecting traditional knowledge owned by a community, group, or individual. A traditional community often requires that certain knowledge be disclosed only to certain limited recipients. In this situation, a customary law can be applicable to protect confidentiality and trade secrets.<sup>48</sup> Public disclosure of sacred-secret materials also can be recognised as traditional knowledge for legal protection.<sup>49</sup>

## B. Traditional Cultural Expressions/Folklore

The term ‘traditional cultural expressions (or traditional expressions of folklore)’ is defined as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community, group, or individual of a particular society reflecting the traditional artistic expectations of such a community.<sup>50</sup> Traditional cultural expressions include verbal expressions,<sup>51</sup> musical expressions,<sup>52</sup> expressions by actions,<sup>53</sup> and tangible expressions,<sup>54</sup> among other things. These may be either intangible or tangible or, most usually, a combination of the two.<sup>55</sup>

The issue of how to protect traditional cultural expressions is more related to copyright law than any other part of intellectual property law. Protecting traditional cultural expressions is not always suitable to modern legal systems since conceptions of intellectual property laws have been developed without considering

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48) U.S. Court, applying Indian customary law, awarded remedies to Tulalip Tribes, indigenous people in Washington State, for breach of confidence when the tribal confidentiality named StoryBase, a digital collection of traditional knowledge, was disclosed.

49) See an Australian case *Foster v. Mountford and Rigby Ltd.* (1977). In this case, court prevented publication of book that contained aboriginal people’s secrets. The court reasoned that the publication of the book may ‘undermine the social and religious stability of their hard-pressed community’.

50) See WIPO, *Intellectual Property and Traditional Cultural Expressions/Folklore* at 6.

51) These include folk tales, folk poetry, riddles, signs, words, symbols, and indications.

52) These include folk songs and instrumental music.

53) These include folk dances, plays, and artistic forms of rituals.

54) These include production of folk art such as drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes, crafts, musical instruments, and architectural forms.

55) See WIPO, *supra* note 50.



the safeguarding of intangible cultural heritage.

In this situation, relevant persons or authorities must make efforts to achieve the goal of protecting traditional cultural expressions. These efforts may include both legal and non-legal measures. Measures can include, among other things, legislating laws for the protection of anonymous and unpublished traditional works, making policy goals for the protection of traditional expressions, obtaining legal personality for relevant communities and groups by forming an association, adapting sui generis aspects of intellectual property systems, and/or recording and documenting cultural expressions.

Contemporary law and legal systems are not good instruments to protect traditional cultural expressions as intellectual property rights. Law is a product of policy goals. Thus, making policy goals to have a better legal system is one of many very important measures to protect intellectual property rights for practitioners, among other measures. However, in this part, only some legal measures are reviewed.

#### (a) Anonymous and unpublished works

The Berne Convention protects anonymous and unpublished works.<sup>56</sup> The relevant part of the Berne Convention is applicable to traditional cultural expressions/folklore through domestic legislation. A practitioner of a traditional cultural expression can also be protected through a treaty if the country of the practitioner in question ratified the treaty.

A practitioner has a right to claim to be identified as his own performance as his live aural performances or performances fixed in phonograms.<sup>57</sup> This is about moral rights of performers.<sup>58</sup> And a practitioner can enjoy the exclusive right of authorising, in regard to his performances, the broadcasting and

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56) See Berne Convention for the Protection of Literary and Artistic Works art. 15.

57) See WIPO Performances and Phonograms Treaty (WPPT) art. 5.

58) Moral rights can only be held by individuals. Groups and communities cannot claim moral rights in their work. In 2000, Australia by amending its Copyright Law of 1968 newly stipulated moral right clauses. See Copyright Law of Australia part IX. In this amendment, moral right is defined as: (1) a right of attribution of authorship; (2) a right not to have authorship falsely attributed; or (3) a right of integrity of authorship.

communication to the public of his unfixed performances and the fixation of his unfixed performances.<sup>59</sup> The exclusive right contains economic rights over the performances.

#### (b) Obtaining legal personality

Traditional cultural expressions are closely related to copyrights. Under modern copyright law, more than one person can be a holder of the right. Traditional cultural expressions are often performed by collective community members or a group. They can form an association that has a legal personality in order to comply with a requirement to hold the copyright. In order to hold the copyright, the work of traditional expression must also be original rather than a repetition of a performance of transmitted work. The originality question can be resolved by recreating the work if the expression in question is made in a tangible medium. Legal remedy is available to the invested right on the traditional expressions.

#### (c) Sui generis measure approach

In recent years, many countries have elected sui generis measures for the protection of traditional cultural expressions mainly by amending or inserting relevant provisions in the existing copyrights law. Some countries established separate laws and systems for protection. A model law for the protection of traditional cultural expressions has guided legislative directions on how and what elements should be included and considered in the course of establishing a new legal protection.<sup>60</sup> Based on this model law, some countries have stipulated the traditional cultural expression, including derivative works, as a new type of copyright.

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59) WPPT art. 6. If a country ratified the WPPT, it must give practitioners of intangible cultural heritage to authorise sound recordings of their performances.

60) See UNESCO and WIPO's Model Provisions for National Laws on the Protection of Expression of Folklore against Illicit Exploitation and other forms of Prejudicial Action of 1982.

#### (d) Recording and documentation

Recording and documentation of traditional cultural expressions play an important role in safeguarding intangible cultural heritage. They are needed for inventories, databases, and lists as an important safeguarding activity. However, in contemporary copyright law principles, recording or documenting intangible expressions itself does not automatically protect performers. Copyright law usually requires a work to be expressed in a tangible medium but traditional cultural expressions themselves cannot be the object of copyright protection since such expressions are 'intangible' and should be a 'living' nature of art. Under this principle, copyrights may be vested in the person including a legal person, who recorded and documented the expressions rather than in communities, groups, or individuals as performers.

### V. Suggestion and Conclusion

How to protect ICH practitioners' intellectual property rights is one of the main issues in implementing the mission given by the ICH Convention to signatories. Present legal systems operated in many countries are not properly designed to protect intellectual property rights for ICH practitioners. Relevant international organisations have made great efforts to ensure that individual countries adopt appropriate measures for safeguarding intangible cultural heritage. Such efforts bring out changes in some countries even though the changes are not a big stride.

ICH practitioners' intellectual property rights are not a full-fledged right in the contemporary legal system. Rather, intellectual property rights for the vast majority of practitioners in the world are not recognised so far. Fortunately, however, things are moving forward to a positive way even though achieving the goal is a far away to go. It is so difficult to fully vest ICH practitioners' intellectual property rights without changing the present legal regime. Changing an old regime is derived from changing one's mind. Every relevant party should keep this change in mind.