

Cultural Sustainability and Self-Documentation: Controlling Intellectual Property

Peggy A. Bulger

American Folklife Center , the Library of Congress

Paper delivered at the American Folklores Society Annual Meeting, Boise, Idaho - 2009

The problems surrounding the sustainability of culture in the twenty-first century are complex and international in scope. As the custodians of culture, folklorists and archivists have a moral obligation to both protect and provide appropriate access to the precious cultural heritage of others. Our efforts have been greatly impacted by the notion that culture is a commodity to be traded on the world marketplace. My presentation will outline the issues surrounding the emergence of cultural property as an international concern and will report on a case study that attempts to solve issues concerning the protection of, and access to, traditional culture.

Cultural Property

The term “cultural property” is a legal term referencing the concept that tangible and intangible cultural products can be owned by an individual or group, to the exclusion of all others. Cultural property is of two types with differing issues associated with each. Cultural property can be tangible, in the form of sacred sites and natural landscapes, monuments, buildings, human remains, archaeological artifacts, handicrafts and other “real property” that has a cultural dimension. Cultural property can also refer to intangible cultural heritage that falls within the realm of “intellectual property” in the form of language, music, song, dance, ritual, customs, local knowledge, oral narratives and literary creations. Cultural property is now a concept applied to all heritage artifacts and traditional cultural expressions.

Tangible Cultural Property

Cultural property issues surrounding prehistoric and historic artworks, artifacts, monuments and sites have been an important concern for folklorists, ethnographers, archaeologists,

curators and archivists since the early 1900s. The assigning of cultural property ownership rights to nation-states and the protection of cultural property by those political entities has been at issue in international legal fora for decades. In 1954 the concept of cultural property was brought to prominence by UNESCO when they used the term in the passage of an international convention to protect and recognize monuments, works of art, traditional sacred spaces and other tangible culture. The destruction and pillaging of tangible cultural products and sites due to war, vandalism, and theft had become an international crisis. UNESCO maintained that these sites and artistic treasures were part of the “cultural heritage of all mankind” in the 1954 Hague Convention on Cultural Property.

Since the Hague Convention, individual countries and the international community have sought to protect cultural property and regulate its movement across borders by passing national legislation and international conventions that rely on the collaboration among lawyers, diplomats, cultural custodians, scholars and traditional communities. In 1970 UNESCO adopted the “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property”, followed in 1972 by the “Convention Concerning the Protection of the World Cultural and Natural Heritage”, the “Convention on the Protection of the Underwater Cultural Heritage” in 2001, the “UNESCO Declaration Concerning the International Destruction of Cultural Heritage” in 2003 and several other diplomatic instruments that sought to preserve and protect tangible cultural property.

In the United States, the 1990 passage of the “Native American Graves Protection and Repatriation Act” (NAGPRA) requires every museum receiving public funding to survey and identify Native American remains and other cultural property in their collections, consult

with the tribes of origin and repatriate any objects that are requested. Although many objects may have been purchased legally years ago from tribal members, the added “moral right” to cultural property supersedes the legal property right.

Intangible Cultural Property

Intangible cultural property is synonymous with “intellectual property” (IP), a legal term that is used to assert ownership over creations of the mind (artistic, commercial, cultural, spiritual). Under IP law, owners (individuals or groups) are granted exclusive rights to a variety of intangible cultural assets, including music, song, dance, dramatic performance, ritual, oral narrative, health processes, literary products, words, designs, symbols, and other manifestations of non-material art and culture. IP rights are established and protected using several legal mechanisms, including patents, copyrights, trademarks, and industrial design rights. The term “intellectual property” is a 20th century concept that has been attributed to the establishment of the World Intellectual Property Organization (WIPO) as a special agency of UNESCO in 1967. (Mark A. Lemley, 2005, page 1033)

In 1998, WIPO initiated a new program to explore the possibilities for protecting genetic resources, traditional knowledge and folklore. A series of fact-finding missions were held in 1999 to identify the needs and concerns of tradition-bearers and cultural communities. This research resulted in the formation of a new WIPO Intergovernmental Committee (IGC) in 2003 to address the issue of “Intellectual Property Rights and Genetic Resources, Traditional Knowledge and Folklore.” In that same year, UNESCO introduced the “International Convention for the Safeguarding of the Intangible Cultural Heritage.” The Convention on Biological Diversity (CBD) and the World Trade Organization (WTO) are also involved with international negotiations that impact the cultural property rights of tradition-bearers and

indigenous communities. The debates surrounding the IP rights to traditional heritage have been on-going (at this writing) for over seven years, with no international agreement reached on the appropriate way to protect the IP rights of tradition-bearers to their traditional knowledge and traditional cultural expressions (i.e. folklore).

Folklore as Intellectual Property

Applying intellectual property rights to folklore can create an incentive for tradition-bearers by providing monetary benefits for the licensed use of traditional culture. On the other hand, defensive IP legislation can restrict the use (or misuse) of traditional cultural expressions by prohibiting cultural elements from being shared beyond the source community. However, establishing ownership of, and enforcing IP rights to, traditional cultural expressions is problematic on many levels. For instance, on the international level, UNESCO and WIPO delegations are composed of legal representatives of national governments who are often asserting state ownership over the traditional cultural expressions of the minority cultures and indigenous groups within their political borders. The tradition-bearers themselves are seldom participants on official delegations that will be determining the fate of their cultural property rights. On the regional level, one complication in assigning cultural property rights is that elements of traditional culture are often claimed and used by more than one individual or group. In addition, culture is not contained by political and/or geographic boundaries and tradition-bearers are often living in diaspora, not in their homeland or source community. On the community level, shared cultural traditions are the cultural property of community members who may not agree on their provenance, their use, or their accessibility.

The application of IP rights to folklore is often contradictory, especially since folklore has no single creator. Critics of assigning intellectual property rights to traditional culture argue that

the cultural commons is shrinking to the point where the natural transmission of culture and artistic expression is being stifled.

Maasai Case Study

I want to present a current case study that has folklorists, archivists, documentarians and intellectual property lawyers responding to a request from a cultural community wishing to learn the knowledge, skills and abilities that are necessary to document, archive, and control use over their own traditional cultural expressions. This project, a collaboration among the World Intellectual Property Organization, the American Folklife Center, the Center for Documentary Studies at Duke University, the National Museums of Kenya and the Maasai community of Laikipia is a pilot project that will provide a model for self-documentation and cultural conservation. The project hearkens back to the old adage that “if you give a man a fish, he eats today, but if you teach a man to fish, he eats forever.”

Cultural sustainability depends upon many levels of care and stewardship on the part of tradition-bearers and inheritors. This pilot project is developing procedures and standards for folk communities to maintain control over the uses of, and access to, documentation of their cultural traditions and folklore. The need for this project was simultaneously recognized at the international and community level. On the international side, the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore had been meeting twice a year since 2003 with little progress and no hope of a consensus on the protection of traditional cultural expressions. On the local community level, the Maasai of Laikipia approached the WIPO Cultural Heritage Project staff to assist them to take charge of and protect the cultural assets within their own community, without the oversight of the Kenyan government. It was apparent that we needed to think outside the box, and go beyond the push for an international treaty.

With these considerations in mind, Wend Wendland of the WIPO secretariat approached the American

Folklife Center to serve as the content experts and educators for this pilot project and we brought in the Center for Documentary Studies at Duke University as a third partner. The AFC is not the first organization or group of folklorists and anthropologists to train tradition-bearers in cultural conservation – Australia, New Zealand, India and other nations have ethnographers working with indigenous communities to pass on these skills. However, this Maasai pilot project is the first to partner public folklife institutions with international policy makers and lawyers to implement the work from both a scholarly/ethnographic perspective and a legal/political perspective. The project engages experts in intellectual property law, Kenyan national policies and law, folklore documentation and professional archival practice.

With the advent of relatively inexpensive digital recording equipment that can be easily operated in the field, as well as inexpensive digital storage systems, it is now possible for communities to document and preserve their own folklore, once they have received some basic training.

To this end, from September 15-30, 2008, the American Folklife Center and the Center for Documentary Studies hosted three participants from Kenya, two of them members of the Laikipia Maasai community and the third a staff member of the National Museums of Kenya. Over the course of the first week of training at the Library of Congress, AFC and WIPO staff provided instruction on intellectual property right issues, project planning, interviewing techniques, research ethics, collections management and preservation. The following week, the participants traveled to Duke University, where they received skills-based training in using a variety of audio-visual media for documentation. The Kenyans then traveled to Geneva, where they were debriefed, provided an evaluation of this first phase of the project, and received further instruction on intellectual property rights issues from WIPO staff.

To complete this first phase, Maasai participant Anne Tome, WIPO's Wend Wendland and I held a special information session at the October 2008 meeting of WIPO's Intergovernmental Committee. There was considerable enthusiasm for the project among a number of national delegations, who

enquired about future field schools for their indigenous communities.

The second phase of the project involved follow-up training in community. On July 4th Guha Shankar of AFC, Tom Rankin of CDS, and Wend Wendland departed for Kenya . Arriving in Nairobi on the 5th these three were joined by Kiprof Lagat, curator at the National Museums of Kenya (NMK) and Ole Tingoi, a Maasai community member and representative of Maasai Cultural Heritage (MCH), a Laikipia community-based organization. The next day, they received the delivery of the basic field recording and archiving equipment that was purchased for the Maasai by WIPO -- a laptop computer, a digital audio recorder, a digital still camera, and an external hard drive. On the following day, they proceeded to Il Ngwesi in Laikipia district, home of the Maasai.

There was an all-day welcoming ceremony at Il Ngwesi involving over a hundred Maasai who gathered from several villages to witness the official transfer of the equipment to the community. The ceremony featured music and dancing by Moran warriors and community women. The dancing was followed by speeches delivered by elders on the importance of the project to the community. Ole Tingoi and Anne Tomei, our two Maasai trainees, immediately put their ethnographic training into practice at the event by recording the songs and dances and other activities. Other members of the community also demonstrated a facility with the digital camera and there were several individuals taking photographs with their cell phone cameras.

Over the next four days, Tom and Guha engaged in pilot documentation projects with the trainees, who numbered five in all. The trainees focused on topics that they wished to pursue more extensively over the next few months including: the central importance of herding to the Maasai; oral histories with elders concerning changes in Maasai folklife; Moran warrior music; and the struggle to provide schooling for Maasai rural youth. Over planning meetings, they discussed other traditional cultural expressions and issues that the Maasai wish to document such as the scarcity of water due its diversion from downstream rivers by agro-business interests, the expropriation of traditional grazing lands by nature conservancies,

conservation and game management, and issues surrounding cultural tourism.

Tom and Gula wrapped up the training and returned to Nairobi, where they met Lagat and visited the LC Field Office in Nairobi. They discussed the involvement of the LC office in the project in the months to come, including taking delivery of the digital files on a periodic basis.

Conclusions

While documentation did not entail any problems, sustaining the momentum generated by the training and safeguarding the collections poses several challenges, including:

- 1) Finalizing the deposit agreement with the AFC and the Maasai quickly, as there now exists a very rich body of material.
- 2) Sources of funding will have to be identified for equipment maintenance and/or replacement.
- 3) The involvement of Information Technology experts will be essential to ensure that the digital recordings are being properly stored and cataloged at the basic level.

There are many other issues to be discussed and time will tell how well the Maasai are able to carry out their goal of both collecting and controlling the use of their traditional cultural expressions. But the AFC, WIPO, and Duke University now have a model for this type of instruction that they can modify to fit the needs of other indigenous groups.

The lessons learned by our staff were many. As folklorists, we often have limited academic goals associated with the fieldwork that we accomplish. We are seeking to provide ourselves, researchers, scholars and community members with a permanent record of the traditional knowledge and folklore that is extant within a community for future analysis and scholarly publication. On the other hand, community members and tradition-bearers may have a very different agenda for the use of cultural documentation. In the case of the Maasai, the folklife

fieldwork that is being accomplished in Laikipia is being used to illustrate (and hopefully solve) economic, political and environmental issues that are threatening the community's traditional lifestyle (i.e. water rights, educational inequities, endangered herding practices).

As international public policy makers are recognizing traditional culture and folklore as valuable assets to be claimed for political and economic purposes, and the rush to "own" culture has taken on a frenetic pace – it is almost a "gold rush" to claim ownership over all "intangible cultural heritage". UNESCO, WIPO, the Organization of American States, the World Trade Organization, and the World Bank have all convened international delegations to grapple with the protection of, and access to, culture. But will international conventions and treaties foster sustainability of traditional culture? There is a real tension between the needs of local, community-based tradition-bearers and the desires of national and international political bodies to "own" cultural assets. In an attempt to support and sustain culture, there have been many missteps along the way. Complex issues arise when culture is claimed for a geographically-based, political entity without regard for the worldwide mobility of tradition-bearers in the twenty-first century. Other issues arise when cultural traditions have evolved over centuries while straddling sensitive geographic/political boundaries. Once international monetary regulators become involved, the debates are taken beyond the sphere of cultural workers and traditional communities into the realm of international trade, patents, copyright and diplomacy. At this point, sustainability of cultural heritage becomes a matter that requires legal assistance and moral guidance.

Aside from community training projects as outlined, we folklorists are the custodians of vast collections of cultural assets. In the twenty-first century, folklorists, ethnomusicologists, archivists and curators are faced with major impediments to the conservation of culture. The issues surrounding the physical and spiritual sustainability of culture and its documentary record are complex and myriad. Ethnographic archives hold treasure troves of traditional cultural expressions from all corners of the globe and this fact has become a central issue at international meetings to establish cultural policy, especially at WIPO.

I have tried to outline the critical role that folklorists and ethnographic archives can play in the preservation and presentation of community-based recordings of folklore and traditional cultural expressions. The Maasai pilot project is an example of how collaborations among indigenous communities, folklorists, policy makers and intellectual property lawyers can establish mechanisms to document culture and provide scholarly access to cultural heritage materials while protecting the intellectual property rights of the tradition-bearers and indigenous communities that have been documented.