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Protection of Intangible Cultural Heritage

A study on the present state of protection of intangible cultural heritage through the work of UNESCO and WIPO

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Abstract

This study seeks to discover the present state of protection given to intangible cultural heritage and traditional knowledge. By looking at the past and present work UNESCO and WIPO, and other related works, the research showcase the process of rising intangible cultural heritage up on the international legislative agenda alongside tangible aspects. Furthermore, the study takes a close look on international legal instruments concerned with both safeguarding and preservation, and with questions concerned with intellectual property. By comparing different legal texts, terminologies and definitions the research uncovers both differences and similarities between the works of UNESCO and WIPO. The study presents the situation of protection of intangible and traditional heritage within the scope of the intellectual property system and concludes that while some aspects and manifestations may be protected, the totality is lacking. However, in case of safeguarding the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* provides a basis that has had a broad appeal throughout the world.

Table of Contents

List of Acronyms

BIRPI	United International Bureaux for the Protection of Intellectual Property
CBD	Convention on Biological Diversity
CICI	International Committee on Intellectual Co-Operation
GATT	General Agreement on Tariffs and Trade
GR	Genetic Resources
IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IP	Intellectual Property
NGO	Non-Governmental Organisation
OAPI	African Intellectual Property Organisation
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
WPPT	WIPO Performance and Phonograms Treaty

List of Official Documents

Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)

Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organisation (1999)

Berne Convention for the Protection of Literary and Artistic Works (1886, 1979)

Convention Concerning the Protection of the World Cultural and Natural Heritage (1972)

Convention Establishing the World Intellectual Property Organisation (1967)

Convention for the Safeguarding of the Intangible Cultural Heritage (2003)

Convention on Biological Diversity (1993)

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

Declaration of Principles of International Cultural Cooperation (1966)

General Agreement on Tariffs and Trade (1947)

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

Lov om Norsk Kulturråd [Law on Arts Council Norway] (2013)

Lov om opphavsrett til åndsverk mv. [Law on Copyright etc.] (1961, 2018)

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1982)

Paris Convention for the Protection of Industrial Property (1883, 1979)

Recommendations on the Safeguarding of Traditional Culture and Folklore (1989)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)

Statute of Anne (1710)

List of Tables

1. Introduction

1.1 A Tragic Example

On the evening of Monday 15th April 2019, the cathedral of Notre-Dame de Paris took fire. The cathedral, which was commissioned around 1160, consecrated in 1189 and finished in 1345 (The Editors of Encyclopaedia Britannica, 2017-b; Hagen, Darrud, Vigsnæs & Bergløff, 2019), is not only an important religious centre for the catholic citizens of Paris but is also a monumental architectural remnant of the past, a huge tourist attraction and, in addition to the Eiffel tower, a defining part of Paris and France (Chrisafis, 2019; Mikkelsen, 2019). Luckily, the cathedral was saved from total destruction and a funding campaign dedicated to its rebuilding has as of the present collected over 700 million US$ (Horowitz, 2019). Gaining its place in UNESCO's *World Heritage List* in 1991 (United Nations Educational, Scientific and Cultural Organisation [UNESCO], n.d.-d), the cathedral is an important heritage site full of art in various forms, in addition to the building itself. It has survived historic events like the French Revolution and the World Wars of the 19th century and is an essential symbol of France (British Broadcasting Corporation [BBC], 2019; Hagen et al., 2019). The worldwide attention that the Notre-Dame de Paris fire got both in mass media and in social media, the unanimous feelings of grief and loss, and the recognition that the cathedral must be rebuilt, show the importance of safeguarding cultural heritage.

1.2 Motivations on Choice of Subject

As a musician my interests are diverse, but the connotation *folk music* has a particular pull. Its implications, the actual music and its meaning to a society are all connected and have for a long time been a field of interest, both specifically for Norwegian folk music and in regard to traditions from other countries of the world. During the study of the music industries and the increased understanding of the legal systems connected to it, the realisation that copyright legislation does not provide satisfactory protection to folk music began to grow. In the process of delving deeper into this matter a recognition that the problem indeed touched upon several other related fields increased the scope of interest. Thus, an interest in the present status of traditional fields and manifestations emerged, particularly in the aspect of intellectual property and related legislation.

1.3 Research Question

Preservation of cultural heritage has been an important part of the workload of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) since its foundation in 1946 (Valderrama Martínez, 1995, p. 26) and particularly the 1972 *Convention concerning the Protection of the World Cultural and Natural Heritage* has become a significant world-wide legal instrument that states the importance of preserving the heritage of the world. In the sphere of cultural heritage, the convention is however limited to heritage that is *tangible*. In 2003 the body of heritage that by nature is *intangible* finally found recognition in the *Convention for the Safeguarding of the Intangible Cultural Heritage*. However, the question of protection in the intellectual property sense remained unanswered.

This study seeks to discover the *present status of protection of intangible cultural heritage*. Through mainly looking at the work of the international organisations UNESCO and WIPO the research hope to highlight the various degrees of protection that exists within the intellectual property system and within other measures. By combining a historical overview and a comparison of different initiatives and legal instruments, the study seeks to describe the possibilities and limitations of the present day.

1.4 Structure

In the further structure of this study a theoretical framework is provided in chapter 2 by introducing the major stakeholders and some of their work, and by defining the core terminology. Chapter 3 presents the methodology by offering the method used in the study and highlighting questions around validity, reliability and ethical concerns. In chapter 4 the findings are presented. These findings will be further discussed in chapter 5 by looking at questions around different terminology, the major stakeholders use of these and the degree of protection. The chapter ends with the considerations one can draw from the previous discussion. Chapter 6 present some concluding remarks, limitations and suggestions for further research.

2. Theoretical Framework

The theoretical framework for this study seeks to present the major stakeholders by looking briefly at their history, previous work and on current projects. Secondly, it provides definitions of the terminology that is key to understanding the complex issues the following chapters presents.

2.1 Major Stakeholders

2.1.1 World Intellectual Property Organisation

One of the most important and prominent international organisations dealing with matters regarding intellectual property is the *World Intellectual Property Organisation* (WIPO). Its history stretches back to two of the first international treaties concerned with intellectual property, the *Paris Convention for the Protection of Industrial Property* from 1883 and the *Berne Convention for the Protection of Literary and Artistic Works* from 1886. The former of these two conventions rose out of the widespread fear inventors felt before the International Exhibition of Inventions held in Austria in 1873 and grants protection to inventions, trademarks and industrial designs. The legal instruments at the time did not offer the ideas and inventions that would be showcased during the exhibition any protection and many exhibitors withdrew their attendance. Likewise, the second convention granted protection to creative works internationally. Before the Berne Convention creative works had been protected by some individual national laws where the protection only applied in the country of origin and not outside of its national borders. The secretariats organised to administer the two conventions merged in 1893 and formed the *United International Bureaux for the Protection of Intellectual Property* (BIRPI). This organisation was then in turn transformed into WIPO when the *Convention Establishing the World Intellectual Property Organisation* entered into force in 1970. This restructuring of the organisation turned it into an intergovernmental organisation with member states. WIPO became one of the United Nations specialised agencies in 1974 (World Intellectual Property Organisation [WIPO], n.d.-a, n.d.-b).

The concerns about protection of folklore arose during the 1960s, particularly due to the increased number of colonies that gained independence from European states. The need to

protect their individual culture and means of expression became increasingly important due to foreign exploitation and commercialisation, and in understanding that continuous technological developments would only increase the abuse (WIPO, 2001-a, p. 2). This concern was also noted internationally, and protection of folklore was tried implemented in the 1967 revision of the Berne Convention without much success. WIPO continued its work on the topic on the other hand, and it made in cooperation with UNESCO a set of *Model Provisions* published in 1982 that could serve at a basis both for national and international legal instruments on protection of folklore. Although the Model Provisions at the time did not lead to the creation of a concrete international legal instrument, the importance of the issue was stated, and work related to it continued. In 2000 a specific body was created for continuing this work that by then had been recognised as containing three individual issues: *traditional knowledge*, *traditional cultural expressions* and *genetic resources*. This body was named the *WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (WIPO, 2016). Although the Committee initially was conceived as an arena for international discussion, its mandate was formalised in 2009 as to work:

> […] towards the adoption of an international legal instrument or instruments
>
> (WIPO, 2016).

As of the present WIPO has renewed the mandate for the Committee for 2018-2019 and has requested it to:

> […] continue to expedite its work, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs) (sic)
>
> (WIPO, 2017-a, p. 11).

2.1.2 United Nations Educational, Scientific and Cultural Organisation

Another important international organisation is the *United Nations Educational, Scientific and Cultural Organisation* (UNESCO). Its history stretches back to the first sessions of the

newly founded *League of Nations* in 1920 when it was felt that also intellectual cooperation was needed, in addition to political cooperation. This mutual understanding resulted in the creation of the *International Committee on Intellectual Co-Operation* (CICI) in 1922 and in turn the *International Institute of Intellectual Co-Operation* in 1926. Focus was given to topics concerning education, social sciences, natural sciences; cinema, libraries and archives, art and letters; and scientific property and copyright (Valderrama Martínez, 1995, pp. 1-2, 4-17).

Although the two bodies worked with great enthusiasm and began important efforts in several areas, the outbreak of the Second World War in 1939 and the ultimate failure of the League of Nations put the work on hold. The idea behind a body for cooperation was not forgotten however, and Ministers for Education in the Allied countries, many of which had exile governments located in London, met in 1942 and agreed that an international organisation for education was needed. Simultaneously, ideas of a new organisation for political and security cooperation was considered and then manifested in the 1945 establishment of the *United Nations* (UN). In the creation of the UN, the need for cultural cooperation was also expressed, and a new conference, with the CICI attending as observer, was duly convened. This in turn resulted in the creation of UNESCO as UN specialised agency on 04th November 1946 (Valderrama Martínez, 1995, pp. 19-21, 23, 26).

Protection of copyright and of the world's heritage has from the start been two of UNESCOs areas of attention, and this too dates back the earlier work of its predecessors. For instance, the *International Institute of Intellectual Co-Operation* worked towards realising:

> World-wide (sic) unification of the laws protecting creations of the mind
>
> (Valderrama Martínez, 1995, p. 17).

To achieve these coals UNESCO has worked extensively, both on its own and in cooperation with other organisations, on the creation of multinational treaties. Among the first was the *Universal Copyright Convention* which entered into force in 1955 and which sought to fill the gab existing between countries partied to the Berne Convention and other countries (Valderrama Martínez, 1995, p. 85, 106). One of the most well-known and important treaties administered by UNESCO is the 1972 *Convention for the Protection of the World Cultural and Natural Heritage*. The text itself, along with its creation of the *World Heritage List* has put preservation of the worlds heritage on the agenda and is an important tool in cooperation

between countries (UNESCO, n.d.-b). The focus on protection of intangible cultural heritage was a logical further step for the organisation, and the cooperation with WIPO on the *Model Provisions* mentioned above was one of the first steps. Further effort resulted in 2001 in the creation of a new list of heritage: The *Proclamation of the Masterpieces of the Oral and Intangible Heritage of Humanity*, which is similar to the *World Heritage List* created after implementation of the 1972 Convention (UNESCO, n.d.-a). In 2003 the *Convention for the Safeguarding of the Intangible Cultural Heritage* was adopted, and it entered into force on 20th April 2006. With the signing of a new treaty especially concerned with intangible heritage, UNESCO also created two new lists: The *Representative List of the Intangible Cultural Heritage of Humanity*, which incorporated the entries registered in the 2001 Proclamation, and the *List of Intangible Cultural Heritage in Need of Urgent Safeguarding* (UNESCO, 2003, 2011-a).

2.2 Definitions

2.2.1 Cultural Heritage

In 1972 the General Conference of UNESCO adopted the *Convention concerning the Protection of World Cultural and Natural Heritage.* One of the direct background reasons for the creation of the treaty was the building of the Aswan High Dam in Egypt, which upon completion would flood the area containing the historically important *Abu Simbel* temples. UNESCO, combining forces with Egypt and several other countries, decided to relocate the temples to safe ground. The initiation of a worldwide fund-raising campaign in 1959 resulted in donations from around 50 countries and in 1968 the 80 million US$ project was finished (The Editors of Encyclopaedia Britannica, 2017-a; UNESCO, 2008, p. 7). This project, along with others, showed the need and interest for an organised protection of the world's cultural sites, and combined with protection of natural heritage, it resulted in the creation of a convention that as of the present date is ratified by 193 states (UNESCO, n.d.-c).

The 1972 Convention grants protection to *cultural heritage*, containing inter alia architectural works, buildings, cave dwellings and archaeological sites; and *natural heritage*, containing inter alia physical and biological formations, the habitat of endangered species and natural sites (UNESCO, 1972, Article 1 & Article 2).

2.2.2 Intangible Cultural Heritage

The success of the 1972 Convention and its World Heritage List proved that the countries of the world was interested in and capable of agreeing on a text for the protection of tangible cultural heritage and natural heritage. The question of protecting intangible cultural heritage was raised in the process but not included due to the lack of legal instruments and practices concerning intellectual property rights at the time (UNESCO, 2011-a, p. 5). The need for this protection was on the other hand strongly felt, particularly in developing countries, and it resulted in the creation of the *Convention for the Safeguarding of the Intangible Cultural Heritage* in 2003.

In the Convention intangible cultural heritage is defined as:

> […] the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize (sic) as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity […]
>
> (UNESCO, 2003, Article 2(1)).

In identifying the gap between tangible and intangible cultural heritage and further specifying the latter UNESCO states that

> Cultural heritage does not end at monuments and collection of objects. It also includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or knowledge and skills to produce traditional crafts
>
> (UNESCO, 2011-b, p. 2).

2.2.3 Genetic Resources

Genetic resources are natural resources such as medicinal plants, agriculture crops and animal breeds, and as such they are not creations of the mind and are not protected by intellectual property rights. The knowledge surrounding them are however, and the increased economic value in biotechnology highlighted the need for protecting genetic resources and its related (traditional) knowledge (Blake, 2001, p. 55; WIPO, n.d.-c). This topics relevance for this text is limited other than noting that it was a central reason for the creation of the *WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (IGC) (WIPO, 2016, pp. 1-2).

2.2.4 Traditional Knowledge

WIPO defines traditional knowledge (TK) as:

> […] knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity
>
> (WIPO, n.d.-d).

Noting that the definition above is not necessarily agreed on universally, the IGC has made efforts to further specify the term and the various forms it may appear in and have come up with a list of different, albeit interconnected, forms. These different forms will be explained briefly in the following:

1. Unfixed / fixed traditional TK
    - Documented TK / non-documented TK
    - Codified TK / non-codified TK
2. Disclosed TK / non-disclosed TK
    - TK directly controlled - / TK no longer controlled by indigenous and local communities
    - TK held by indigenous and local communities
3. Sacred TK / secular TK
4. TK *as such* / TK-based innovations and creations
5. Indigenous knowledge / traditional knowledge

6. Individual TK / collective TK
7. Commercialised TK / non-commercialised TK

(WIPO, 2010-a, Annex p. 4).

Dimension 1 relies on the definition of the term *fixed* in Article 2(c) in the *WIPO Performances and Phonograms Treaty* (1996-b) that describe it as:

> […] the embodiment of sounds, or of the representation thereof, from which they can be perceived, reproduced or communicated through a device.

This means that the TK is fixed in a form that is stable, material or tangible, which is either *verbal*, *non-verbal*, *written* or *non-written*, or a combination of the four. *Verbal* form relies on the presence of words, such as song lyrics, while *non-verbal* is the lack of words, like architecture. *Written* form is the fixation of TK in words or sheet music while *non-written* may be a song recording. *Non-fixed* form is the lack of a stable, material or tangible form and is a common way in which TK appear. The transmission of history, music, skills and techniques *orally* or in other *non-written* forms is often central when TK is concerned and may be both *verbal* or *non-verbal*. WIPO include two related sub-categories to this dimension, *documented TK* and *codified TK*, or the lack thereof. *Documented TK* is closely linked to *fixed TK* and refer to the different stable forms it appears in, both with and without words and both written or not. The other sub-category, *codified TK* is structured in a systematic form and refer mostly to written forms, however is it noted that *non-written* forms like practices and experiences, like know-how, also may be *codified* in some sense. *Non-documented* and *non-codified TK* is thus the lack of a stable recorded or systemised form in the sense that it is transmitted orally (WIPO, 2010-a, Annex pp. 4-8).

Dimension 2 on *disclosed TK* and *non-disclosed TK* are the questions on who has insight into certain information and to what degree it is easily obtainable. Traditional knowledge can be made known through its use, oral delivery and documentation. Much traditional knowledge is available both through physical documentation and online sources and are relatively easy to obtain. The IGC categorised this kind of TK as *publicly disclosed TK*. Other sources have a *limited accessibility* as they are kept at specific archives and are not that easily to get a hold on. In indigenous communities TK may be disclosed to various degrees within the community and are is treated as sub-category referred to as *TK held by indigenous and local communities.* The TK may be known by all members of the community, or be secrets known

only by a few specific persons. The other sub-category raised the question on whether the TK and the knowledge about it is *controlled by the indigenous community* or not. If the TK is only obtainable through direct contact with the community concerned, it is thus controlled by it, but in the opposite situation third-parties have received the information, either with or without the consent of the original community (WIPO, 2010-a, Annex pp. 8-10).

The subject of *sacred* and *secular TK* is specific to each individual community and whether or not the TK is sacred is defined the community and its religious leaders. Though it in essence is not commercialised initially, efforts either from within or through impact from the outside may initiate a process of commercialisation through which the border line between sacred and secular become blurred. As TK is commercialised the knowledge of it become disclosed to the public (WIPO, 2010-a, Annex pp. 10-11).

The term *TK as such* is defined as:

> […] knowledge systems, creations and innovations which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment
>
> (WIPO, 2010-a, Appendix).

It is important to note that in this category the essence is that TK is not unalterable or final, and that it is in its nature to change over time. This is an obvious challenge to traditional intellectual property laws. Innovations and creations *based on* TK *as such* challenge the definition above as they are created outside the community and thus *beyond* the traditional context. The makers of these innovations and creations may come from the community or be third-parties (WIPO, 2010-a, Annex p. 12).

Dimension 5 deals with the somewhat vague difference between *indigenous* and *traditional knowledge.* The IGC builds on a definition of *indigenous* as peoples characterised as *pre-colonial* and that *consider themselves distinct* from other parts of the wider society they exist beside (WIPO, 2001-b, p. 23). Their traditional knowledge is thus defined as *indigenous knowledge*, and the distinction is dependent on this categorisation (WIPO, 2010-a, Annex p. 13).

Traditional knowledge is, in its most common form, *collective* in essence, but specific individuals may hold knowledge that is unknown to the rest of the community. This may especially be a relevant distinction in cases where traditional knowledge is in danger of extinction and where a few individuals are the only sources to various parts of that knowledge (WIPO, 2010-a, Annex p. 13).

The last dimension on *commercialised* and *non-commercialised TK* ask the questions of whether a monetary system, which commercialisation relies on, is in place or not, and if traditional knowledge is used within in. This distinction is relevant for indigenous knowledge that resides in communities with limited monetary systems (WIPO, 2010-a, Annex p. 14).

2.2.5 Traditional Cultural Expressions

The term *traditional cultural expressions* refer to the manifestation of the traditional knowledge explained above and is the embodiment of know-how and skills. This include music, art, designs, symbols and performances. Another choice of words that is used interchangeably is *expressions of folklore* (WIPO, n.d.-c). As the content of this term is somewhat more tangible than traditional knowledge *per se*, existing intellectual property law systems can provide some protection. Newly made adaptations based on traditional knowledge is protectable and trademark law can be used to protect indigenous art (WIPO, n.d.-c). Performers whom in some way present expressions of folklore are in the *WIPO Performances and Phonograms Treaty* Article 2(a) protected on the same level as other performers (1996-b).

2.2.6 Intellectual Property and Copyright

The notion of intellectual property has its roots in the concepts of private property rights, like the theories of John Locke proposed after the *Glorious Revolution* of England in 1688. The basic characteristics of the property notion is *exclusivity* and *transferability*. This grants the owner of the property the right to deny its use to third-parties and the right to transfer the title freely to others (Kretschmer & Kawohl, 2004, p. 21). Other writers rejected the thought that intellectual territory could be treated equally like physical property. The Prussian philosopher Immanuel Kant saw the source of copyright rather from the natural right of self-expression,

and the French writer Denis Diderot stated that *an author's bond with a work is inviolable […]* (Kretschmer & Kawohl, 2004, p. 31). Furthering the thought of Kant, Johann Gottlieb Fichte constructed a theory that recognises three distinct, yet related properties in an intellectual work. Exemplified with a book, Fichte identifies these three domains to be:

1) *The physical copy*, which is bought and thus fully owned by the buyer
2) *The ideas that the work proposes*, and which is shared in common between the writer and the reader(s)
3) *The abstracted from*, which is the basis for the work and therefore remains the property of the author

(Kretschmer & Kawohl, 2004, p. 32).

The first legislation concerned with intellectual property was solely centred on printing and reprinting, particularly after the invention of the printing press around 1540. The State or the Crown granted, in return for fees, *monopoly privileges* to printers and sometimes creators themselves to publish their works, most often for a limited time frame. For the government this system was a functional way of enforcing censorship while also ensuring economical income. The first known printer who received such a privilege to publish music was Ottoviano Petrucci in Venice in 1498 (Kretschmer & Kawohl, 2004, p. 21). Famous composers who also benefited from this system were Thomas Tallis and William Byrd, Georg Friedrich Handel and Johann Sebastian Bach (Kretschmer & Kawohl, 2004, p. 24).

The Crown privileges are by definition not equal to later copyright legislation as they are not automatically granted and could be withdrawn. Secondly, privileges where granted to protect the act of printing and reprinting, and not to the underlying work itself (Kretschmer & Kawohl, 2004, p. 25). The first proper copyright law is considered to be the *Statute of Anne*, which was passed into English law in 1710, and it provided a fourteen-year protection period, renewable once, to *Books and other Writings*. Though it was not initially thought to include music, it was later stated in a court case filed by J. S. Bach's youngest son Johann Christian Bach that the Act, through its rather ambiguous wording, also should include sheet music as a form of writing (Frith & Marshall, 2004, p. 7; Kretschmer & Kawohl, 2004, pp. 26-27, 34-35).

The first international treaty concerned with copyright for creative works is the *Berne Convention for the Protection of Artistic and Literary Works* from 1886. The convention protects:

> […] literary and artistic expressions that were fixed in a tangible form […]
>
> (Frith & Marshall, 2004, s. 12).

Since the Berne Convention does not protect sound recordings, another treaty was signed in 1961, the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* on protection of sound recordings and performers. An interesting note is that the world's biggest marked during this period, the United States of America, did not sign either of these conventions at the time due to disagreement over *performers' rights* and *moral rights* respectively (Frith & Marshall, 2004, pp. 12-13).

In copyright legislation the term *copyright* is understood as a *bundle of rights*, rather than a single right, and these are afforded solely to the rights owner. Among other rights, it gives the rights owner the exclusive right to:

1) Copy the work
2) Make adaptations (or prepare derivative works)
3) Issue copies of the work to the public
4) Perform the work in public
5) Broadcast or send a cable transmission of the work

(Frith & Marshall, 2004, pp. 6-7).

In addition to the rights mentioned above, authors have a *moral right* (droit moral) in their work, although this is not recognised in all law systems. This right cannot be transferred or sold to third parties, unlike other rights. The moral right has several under-categories:

1) *The paternity right* (droit à la paternité)
    - The right to be identified as the author
2) *The right of integrity* (droit à l'intégrité)
    - The right to object to the 'derogatory' treatment, to its 'alteration' in any way which is 'a distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author'
3) *The publication right* (droit de divulgation)

- The right to determine when or whether a work shall be published

4) *The withdrawal right* (droit de retrait)
   - The right to withdraw or modify a work already published

(Frith & Marshall, 2004, pp. 9-10).

2.2.7 Public Domain

The concept of a *public domain* is central in copyright law, but its definition and scope are not necessarily universally agreed upon, especially in the context of traditional knowledge and traditional cultural expressions. Black's Law Dictionary define it as

> […] inventions and creative works that are not protected by intellectual property rights and are therefore available for anyone to use without charge […]
>
> (Black's Law Dictionary, 2005, p. 1027 cited in WIPO, 2010-b, Annex p. 1).

The causes for works to be in the public domain is further outlined as being due to insufficient originality, invalidation or expiry of protection, or the lack of registration. It is often thought that the sphere between IP-protection and public domain is a one or the other-situation, but there are in fact several stakes in-between (WIPO, 2010-b, Annex pp. 1-2).

A core question is *accessibility*. Material that is accessible on a *free and open source* does not proportionately imply that it is in the public domain, e.g. traditional cultural expressions found on the Internet. Vice versa, material might not be accessible even though it is in the public domain as it relies on availability. In addition, the concept of public availability is not synonymous with available for free as there might be conditions on use, like prior informed consent (WIPO, 2010-b, Annex p. 2-4).

A variation of the common understanding of the public domain is a *domaine public payant* or *paying public domain*. In this system a work that no longer is protected under copyright law cannot be used for free, like in the normal public domain system, but rather against a fee. It works as a compulsory licence where use of the work requires payment of the fee. The beneficiaries of the fees collected are commonly the authors' societies or the State in question who in turn manages funds devoted to various cultural missions (UNESCO, 1949; WIPO, 2010-b, Annex p. 12).

3. Methodology

The following chapter provides the methodology of the study by presenting the chosen research method and the sources of data. Then questions on the validity and reliability of the study are debated in light of relevant theories, and finally some ethical concerns are stated.

3.1 Qualitative and Quantitative Research

It is common to differentiate between two separate methods for collection of research data, the *qualitative* and the *quantitative* method. The qualitative method collects data in the form of words, sentences and opinions, while the quantitative method accumulates mathematical numbers. Both research methods have their own advantages and disadvantages and are often regarded as complementary to each other. On the other hand, though, the relationship between the champions of each research method have through the ages been subject to heated debate (Jacobsen, 2015, p. 125).

This research builds on the qualitative method. This methodology is suitable when collecting data and information on a subject or situation one does not know much about beforehand and when the research question(s) is unclear. It is open for unexpected occurrences and can be adapted to a changing research environment underway. Qualitative research favours nuances and openness and is suited to develop theories and hypothesises. A direct benefit is the access to *direct quotes* one can insert into the research text. On the other side, though, qualitative research can be cumbersome, with resource intensive methods like interviews, observation and document examinations. This can lead to a problem on *generalisation*: is the research data representative? Furthermore, the collected amount of data can be vast, which in turn make the analysis complex due to the wealth of nuances (Jacobsen, 2015, pp. 64 ,129-134, 137, 217).

3.2 The Collection of Data

This research is based on the examination of documents, which is one of the research methods within the qualitative methodology. The data that is collected is called *secondary data* and is originally collected by others. Common sources of data are official documents,

books and web pages (Jacobsen, 2015, pp. 140, 170). A rationale for choosing this approach is the interest of the research in various, primarily international, laws and conventions and the different approaches, definitions and limitations they stipulate. Another aspect is the practicality of this method as the research data is available at all times. Then the researcher can wholly control the exact time and date for using the data, as opposed to interviews and observations that have to be arranged in cooperation with the timetables of other persons and/or organisations. Particularly the aspect of online accessibility, which is a defining character of the Internet, ease the collection of data. The main stakeholders this research is concerned with, UNESCO and WIPO, both have an extensive online library of official documents which is relatively easy obtainable. In the case of the latter, the global database *WIPO Lex* contains not only WIPO's own treaties and documents but also that of other countries and organisations concerned with intellectual property (WIPO, n.d.-g). In the case of Norway, the foundation *Lovdata*, jointly created by the Ministry of Justice and the Faculty of Law at University of Oslo provide online access to Norwegian legislation (Lovdata, 2018).

3.3 Validity and Reliability

In the process of research three fundamental questions arise when reviewing the methodology: does the collected data give the desired answers, can the data be used in other contexts and is the collected data reliable (Jacobsen, 2015, pp. 227-228)?

3.3.1 Internal Validity

The core question on *internal validity* is the focus on whether the objects of study and the collected data give a true representation of the reality. As data originates from sources, the validity of these sources is important in judging whether they are the correct sources for the relevant research. In this regard it is of significant value to recognise that a source does not necessary give a representative picture of reality, even though it might be portrayed to do so. On assessing the validity of the collected data, the question of *proximity* to the phenomenon is important as this often give the researcher a picture on the quality of the data. The closer proximity, the more reliable is the data, due to it not having been processed by several instances on the way. In reviewing a phenomenon, the collection of data from *multiple* and

independent sources strengthen the research as this is more likely to give a correct representation. Whether or not the different sources agree or disagree is of less importance as this only showcase the possibility of having different interpretations on a matter (Jacobsen, 2015, pp. 229-231).

After having assessed the sources and the collected data, the researcher makes choices on which details to include and which to discard. In this process of systematisation, the researcher makes choices and draw possible conclusions, in which one must be observant that the presented data might showcase the opinions and prejudices of the researches rather than that of the actual data (Jacobsen, 2015, pp. 233-237).

The primary sources of data are the two major stakeholders, UNESCO and WIPO, supplemented by research done by others on these organisations and their work. The data collected from these sources are of primary two kinds: actual laws and international conventions, and the assessments of these. In surveying the legal texts, the understanding of the provisions and their scope is central. The ability of the researcher to fully comprehend the subtleties of these advanced formulations is important and is a possible source of misinterpretations, particularly when comparing them to each other. Furthermore, the research done by other researchers can be coloured by their proximity to the organisations and their general view on the subject matter. Additionally, it is critical to remember that the organisations, through their own publications, naturally wish to present themselves and their work in a positive view, and that an independent researcher must not be blinded by these presentations.

3.3.2 External Validity

External validity is whether the results from the research can say something about another case or research. The ability to *generalise* through theories is one of the strengths of the qualitative methodology. However, the likelihood that the result can be generalised depends on the number of sources or units, and the choice of them. In theory, the more sources or cases that can show the same result, the more likely is a successful generalisation ability. The choice of units of study can either be classified as typical or representative, as showing the broad picture, or highlighting the least likely (Jacobsen, 2015, pp. 237-241).

The core question of protection of traditional knowledge and/or intangible cultural heritage has been on the agenda for several decades. Both the major stakeholders themselves and independent researchers have questioned the past, present and possible future state(s) of this subject matter. With this in mind, the current research has the opportunity to draw parallels to other relevant research and to build further on those conclusions already reached. By looking closely on international legislation on the matter, while also bearing in mind regional and national laws, the research has the possibility of finding similarities and differences that put together might be able to highlight what is potentially missing in the present legal texts.

3.3.3 Reliability

The *reliability* of the collected data relies on the recognition that the research itself might have created the results. This notion builds on three aspects: the research design, the process of collecting the data and the analysis of the collected material. The research design is affected by the situation the research is carried out in, e.g. whether the environment is natural or artificial for the researcher and/or the subjects of research, and the possibility of disturbances. The collection process is of importance for the quality of the collected data, and the capacity of the researcher to correctly record the material is key. Inattention, or simply sloppiness, can result in good data disappearing or being overlooked. Additionally, when writing notes the aptitude of the researcher in writing the correct notes plays a role. In this regard it is also useful to remember that the researcher during the process of research acquire new knowledge about the topic, and thus may fail to see something that might be useful on a later stage. In the process of analysis, the categorisation of data into units affect the ability of the researcher to see relations and to draw conclusions between them. Wrong categorisation can in other words lead to incorrect or misleading conclusions (Jacobsen, 2015, pp. 232, 241-246).

The primary source of data in this research are legal texts, both international, regional and national. This type of writings is not the most common reading material for ordinary people and might on that notion be regarded as an artificial environment. The ability to correctly read, understand and interpret these texts is solely the responsibility of the researcher and is a potential source of misinterpretations. Particularly in the process of comparing legal

instruments, the understanding of subject matter and variations in definition, scope and other aspects is crucial.

3.4 Ethical Concerns

A fundamental principle within research methodology is the correct presentation of data. To achieve this should be one of the primary goals of the researcher, while also accepting the reality that it is mostly impossible to fully reproduce results within its complete context as details, nuances and diversity is reduced underway. With this in mind one should strive to avoid taking something out of its context, particularly direct citations, and utilise it to argue for something of different or opposite nature. In the principle of correct presentation of data lies moreover a commitment to not falsify results. Failure to show negative data that refutes the research question or manipulation of the data are actions that should be avoided at all cost (Jacobsen, 2015, pp. 51-53).

Another ethical concern that the researcher must be aware of is his or her relationship with the society at large. It has been argued that all research should be completely neutral and thus taking no party or favour any agendas. Opponents of this belief deduce that no one, neither layman or researcher, are completely neutral as everyone has some initial values and interests that will affect their conduct and subsequently also potential research. In this realisation lies however the safety net that critical questions will highlight the aspects that are left out or overlooked in a research, and that openness is key to justify the choices made and the general usefulness of the research to the society (Jacobsen, 2015, pp. 55-56).

4. Findings

This chapter showcase the findings of the study. Firstly, the process of recognising intangible cultural heritage as equally worthy of safeguarding alongside tangible aspects is presented, and then a shift in terminology is shown. Secondly, the relationship between the subject matter and relevant legislations, both international, regional and national, is debated.

4.1 The Path towards Protection of Intangible Cultural Heritage

4.1.1 From Recognition to Conventions

The definition of intangible cultural heritage and the recognition that it should be preserved and protected dates back to the early work of the League of Nations and its successors, and the policies that evolved after the Second World War ended in 1945. The devastating effect that the war had on cultural sites around the world and the acknowledgement that international cooperation was needed, both to rebuild the post-war world and to prevent a third world war, led to a number of cooperation processes spearheaded by UNESCO. The 1954 *Convention for the Protection of Cultural Properties in the Event of Armed Conflict* (UNESCO, 2017-a) was for instance an important step towards recognising the importance of the continuous preservation of the heritage of the world both in times of peace and of war (UNESCO, 2011-a, p. 4). Another serious step in the process was the 1966 *Declaration of the Principles of International Cultural Cooperation* that instituted the policies of UNESCO's international work, and it states that

> Each culture has a dignity and value which must be respected and preserved, and that every people has the right and duty to develop its culture […]
>
> (UNESCO, 2011-a, p. 4).

The aforementioned actions and the culmination of the 1960s campaign to relocate the Abu Simbel temples in Egypt resulted in the 1972 *Convention concerning the Protection of the World Cultural and Natural Heritage* which really put the preservation of cultural heritage on the agenda. Unfortunately, intangible cultural heritage was not included at the time. UNESCO, in a joint venture with WIPO, initiated the process of drafting the framework of a legal instrument that could serve as a basis for both national and international protection of

intangible cultural heritage, which resulted in the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions* (Model Provisions) in 1982 (UNESCO, 2011-a, pp. 5-6). The next defining step was the *World Conference on Cultural Policies*, called Mondiacult, held in Mexico City in 1982. This conference recognised that the success of the 1972 Convention had overshadowed areas and topics not included in the convention and that these forms of heritage should be raised on the agenda. This occasion is indeed on of the first times that the term *intangible cultural heritage* was used officially (UNESCO, 2011-a, p. 6). In addition, the conference redefined the term *culture* and widened its definition to include a number of non-material substances:

> The set of distinctive spiritual, material, intellectual, and emotional features of society or a social group. In addition to art and literature, it encompasses lifestyles, basic human rights, value systems, traditions and beliefs
>
> (UNESCO, 1982-b, cited in Mattelart, 2011).

In its effort to redefine the view on culture, the conference stated the equal importance and value of all cultures and stressed that no notion of superior versus inferior cultures exists or should be accepted, and that both past, present and future variations are of equivalent value (UNESCO; 2011-a, p. 6).

The Mondiacult Conference sat the agenda for the following years, and in the spirit of the conference UNESCO presented and adopted in 1989 the *Recommendations on the Safeguarding of Traditional Culture and Folklore*. This document utilised the term *folklore* and present the member states of UNESCO with recommendations on how this heritage could be defined and what measures could be taken to assure its preservation. As the first legal instrument of its kind concerned with this aspect of cultural heritage, it paved the way for the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* and the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* that, alongside the 1972 Convention, puts intangible cultural heritage on the map (UNESCO, 2011-a, pp. 7-8, 12).

The 1972 Convention recognises the increased threat that cultural and natural heritage faces from *changing social and economic conditions* (UNESCO, 1972, p. 1). The increased industrialisation that several developing countries initiated after gaining independence from their colonial masters put pressure on both cultural and natural heritage within these

countries. The construction of the Aswan High Dam in Egypt is but one example. The 2003 Convention builds on this by pronouncing the *interdependence between the intangible cultural heritage and the tangible cultural and natural heritage*, and states that

> […] the processes of globalization (sic) and social transformation […] also give rise […] to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage […]
>
> (UNESCO, 2003, p. 1).

Both conventions put responsibility on the individual state to uphold the provisions of the treaties, which among others commits the states to identity and define heritage within its borders, and to make inventories of their findings. The *World Heritage List* and the *List of World Heritage in Danger*, established by the 1972 Convention, and the similar *Representative List of the Intangible Cultural Heritage of Humanity* and the *List of Intangible Cultural Heritage in Need of Urgent Safeguarding*, established by the 2003 Convention, are further international steps, based on the national inventories, that showcase the universal value of the properties included. The 1972 Convention states that the properties included in the lists are of *outstanding universal value* (UNESCO, 1971, Article 11(2)) and the 2003 Convention expresses the rationale that the lists should *ensure better visibility of the intangible cultural heritage and awareness of its significance* (UNESCO, 2003, Article 16(1)).

As of 2017 the 1972 Convention has been ratified by 193 countries (UNESCO, n.d.-c) and the 2003 Convention by 175 countries (UNESCO, 2017-b), and thus both conventions are nearly accepted worldwide. However, it is worth noticing that several countries that have a large industry on export of cultural products, like the United States and Great Britain, have not signed the latter convention.

4.1.2 From ‘Folklore’ to ‘Intangible Cultural Heritage’

The 1989 *Recommendations on the Safeguarding of Traditional Culture and Folklore* propose a possible definition of folklore as:

> […] the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized (sic) as reflecting the expectations of a

> community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicraft, architecture and other arts
>
> (UNESCO, 1990, Annex 1 p. 239).

When UNESCO in 1999 evaluated the impact of the 1989 Recommendation the conclusion was that it was ineffective, as it had little impact on national legislations, and not geared towards the future (Testa, 2016, p. 225). The definition of folklore it relied on was has been considered narrow and blurry, and overlapping with matters more accurately put within the tangible category, like architecture (Blake, 2001, p. 9; Testa, 2016, p. 224). However, Blake (2001, p. 11, note 48) recognises that the subject matter is difficult to define and that it took in total 16 years to agree on a final draft for the 1989 Recommendation.

In addition to the general negativism toward the 1989 Recommendation, concerns were also voiced about the term *folklore* in itself. It was felt, particularly by developing countries and indigenous peoples, that the term was to Eurocentric in its essence and that it was too closely connected with colonialism. It was noted that earlier endeavours to protect heritage had, in what was considered common European practice, focused to clearly on that of a tangible character and that the whole distinction between tangible and intangible heritage is rejected by many indigenous communities (Blake, 2001, pp. 7-9; Testa, 2016, p. 225).

Several different words and terms were considered in the process of finding an acceptable replacement for the negatively charged term *folklore*, including *traditional, living, oral* and *intangible*. In the 2001 list of heritage, *Proclamation of the Masterpieces of the Oral and Intangible Heritage of Humanity*, the combined term *oral and intangible heritage* is used, which is somewhat of pleonasm as heritage transmitted orally is by definition of an intangible character (Blake, 2001, p. 9; UNESCO, 2011-a, p. 10). This gradual process of changing terms and its definitions has for the sake of UNESCO currently ended with the 2003 Convention that explicitly avoid the term *folklore*, and instead relies on *intangible cultural heritage* and its more refined definition.

4.2 Intellectual Property Rights and Intangible Cultural Heritage

The concept of intellectual property is largely individualistic in essence as it harks back to the thoughts of exclusive property rights in the material sense. Furthermore, it has a strong economic rationale as an incentive to create, as the rights attached to it entitles the creator to fair remuneration. The first international copyright law, the Berne Convention, refer to *artistic and literary works*, and along with the subsequent *WIPO Copyright Treaty* (WCT) and *WIPO Performances and Phonograms Treaty*, set the precedent that works need to be *fixed* in a material form. This builds on the concept that it is the *form* that an idea takes that is protected and not the underlying *idea* itself. This is stipulated in the WCT:

> Copyright protection extends to expressions and not to ideas […] as such
>
> (WIPO, 1996-a, Article 2).

This reliance on a tangible form is problematic when IP protection is tried applied to cultural heritage based on traditional knowledge, which is often transmitted *orally* and thus in a *non-fixed* form.

Another core characteristic of copyright law is the notion of *originality*, as one of the fundamental motivations behind the whole concept of IP protection to begin with was to prevent infringement against original works. This condition does not fit well with intangible cultural heritage which, by definition, has evolved over generations and thus most often does not have a certain point in time which can be defined as the point of creation. Together with the strong focus on the author as an *individual*, which clashed with the articulated communal character of many, particularly indigenous, groups, showed the sizable gap between copyright law and the characteristics of intangible cultural heritage. Indeed, the whole notion of private ownership may be rejected be certain communities.

The *duration of protection* is a feature of copyright laws that has implications for the protection of intangible cultural heritage. When the period of which a protected work is over the work in question is considered a part of the *public domain*. However, this specific notion of time does not fit with traditional knowledge and heritage, which in the definition of being delivered over several generations, is long overdue of any protection period offered by regular copyright law. And, for communities and groups which have, or want control over their traditional knowledge and heritage, the concept of a public domain is alien, and is only considered a *western* concept which fosters exploitation.

The additional concept of *moral rights* can be considered as to offer a form of limited protection, outside of the problems of copyright outlined above. As moral rights grant the author the rights, among others, to be *identified as the author* and to *object to derogatory treatment* or *alterations*, the possibility for control, rather than remuneration, is present. From the other category of intellectual property, *industrial property*, first established by the Paris Convention the concept of indication of geographical origin, *appellation of origin*, can be used to authenticate heritage (Blake, 2001, p. 16; WIPO, n.d.-b, n.d.-h).

4.2.1 The Model Provisions

The *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (Model Provisions) was made in cooperation between WIPO and UNESCO and adopted in 1982. The text builds on a notion of reciprocity, both between existing national laws and international treaties, and have a clear agenda as to be the first step towards a regional or international system of protection (Blake, 2001, pp. 19, 21). The Model Provisions deals with *expressions of folklore* and uses the term *productions*. This is to mark that it aims to provide a *sui generis*-type (specific, special) of intellectual property protection different from that given in other legal instruments, like the Berne Convention, which uses the term *works* (WIPO, n.d.-c). Furthermore, these productions have to include:

> […] characteristic elements of the traditional artistic heritage developed and maintained by a community […] or by individuals […]
>
> (UNESCO/WIPO, 1985, Section 2).

By including the term *artistic* the scope of the Model Provisions is limited as it does not include *traditional knowledge* as whole (Blake, 2001, p. 20; WIPO, 2001-a, p. 7).

The definition is further defined into four categories with consecutive examples and, as a clear break with copyright laws, the Model Provisions does not distinguish between productions made by individual authors or by the community as a whole. The four categories are:

1) Verbal expressions
    - Folk tales, folk poetry, riddles
2) Musical expressions
    - Folk songs and instrumental music
3) Expressions by action
    - Folk dances, plays and artistic forms or rituals
4) Tangible expressions
    - Productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware (sic), jewellery, basket weaving, needlework, textiles, carpets, costumes;
    - Musical instruments;
    - [Architectural forms] (sic)

(UNESCO/WIPO, 1985, Section 2)

The three first categories do not need to be fixed in a tangible form, unlike the fourth category (Blake, 2001, p. 20) which has an obvious similarity with the definition of cultural heritage found in the 1972 Convention (UNESCO, 1972, Article 1). However, the Model Provisions has according to Blake (2001, p. 19) had little impact national legislation.

4.2.2 From Berne to TRIPS

The Berne Convention from 1886, last amended in 1979, has become a cornerstone in international legislation dealing with copyright. Its subject matter is *artistic* and *literary works*, and its definition is rather broad, however with a complementary list of possible forms in which the work concerned may take. It does not refer to either traditional knowledge or expressions of folklore, but Article 2(1) states that a work is protected in *whatever may be the mode or form of expression* it takes (Berne Convention, 1979). One may argue that certain forms of intangible cultural heritage may find protection under this part of the definition, particularly expressions of folklore. The protection of expressions of folklore was indeed a background thought for the inclusion of Article 15(4) which relates to *unpublished works where the identity of the author is unknown*, however this intention is not stated explicitly, and thus the scope of success is limited (Blake, 2001, p. 22; WIPO, 2001-a, p. 4). Article 2(2) stipulates that each individual country of the union may themselves choose whether works

need to be fixed in a material from or not to be eligible for protection (Berne Convention, 1979), but it seems that it has become the modus operandi, at least partly for practical reasons, to rely on some form of fixation. The convention has a main focus on the authors economical rights but does also include *moral rights* in later versions. (Berne Convention, 1979, Article 6bis).

After the Second World War increased cooperation regarding trade and other economical questions stood high on the agenda. This led to the signing of the *General Agreement on Tariffs and Trade* (GATT) in 1947, which in turn was transformed into the *World Trade Organisation* during the last round of GATT-negotiations, the *Uruguay Round* from 1986 to 1994 (World Trade Organisation [WTO], n.d.-a, n.d.-b). During this negotiation an agreement regarding intellectual property rights was also signed, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). This agreement sought to set international standards regarding IP rights, as the different national legislations round the world had a wide range of variations (WTO, n.d.-c). The agreement would, as Blake puts it:

> […] harmonise IPR standards (sic) as they apply to trade in order to encourage international trade and provide it with a more secure basis
>
> (Blake, 2001, p. 25).

The TRIPS Agreement builds on the Paris Convention from 1883 and the Berne Convention from 1886, and in regard to the latter it requires the member states to accept Article 1 to 21. The success of the agreement in establishing the economic rights granted in the Berne Convention, and certain neighbouring rights (Article 14), however without referring in the latter case by name to the Rome Convention, has led to a more uniform international legislation (Blake, 2001, pp. 25-26). It has made other legislation lose much of its importance, for instance the Universal Copyright Convention (Duhaime, 2012). A significant exception to the demand that the articles of the Berne Convention are applied, is the opportunity to leave out Article 6bis on moral rights. This is particularly disappointing for the matter of intangible cultural heritage. Additionally, the Preamble of the TRIPS Agreement states explicitly that is protects only *individual rights,* and as such does not recognise knowledge held collectively. Furthermore, is does not make any distinctions between the industry as a whole, and indigenous and local communities (Blake, 2001, pp. 26, 54). The agreement does not, on the other hand, however Eurocentric it may seem to be, prevent the individual states from adopting *sui generis* laws on their own, as the provisions of the

agreement only stipulates minimum requirements (Blake, 2001, pp. 54-55). Some *secret* knowledge may be considered protected under the agreement (Article 39), although it requires it to be due to the commercial value the secrecy provide (Blake, 2001, p. 55).

4.2.3 National and Regional Legislation

4.2.3.1 Norway

Norway is country with a high degree of industrialisation and about 82 % of the population lives in or near a city. It has a homogenous society with a high level of education. Before the 19th century Norway was usually seen as a periphery to the great cultural capitals of Europe, and thus the country got a rich culture that evolved on its own. Globalisation and the increased amount of impulses from the outside world, particularly from what is known as the *West*, has over time, some would argue, put the *proper* or *primeval* Norwegian culture under strong pressure, particularly after the Second World War (Reisegg, 2014; Thuesen, Thorsnæs & Røvik, 2019).

The central Norwegian law on copyright and related rights is *Lov om opphavsrett til åndsverk mv. [Law on Copyright etc]* from 1961, last updated in 2018 (Åndsverkloven [Copyright Act], 2018). It is closely connected to international treaties that Norway has signed, like the Berne Convention, the UCC, the Rome Convention and the TRIPS Agreement, and recognised both the economic aspects of copyright, moral rights and neighbouring rights (Copyright Act, 2018, §§ 2 - 24). Paragraph 3 stipulates the conditions for the copyright to apply and it does not explicitly demand fixation. The paragraph reads [my translation]:

> The copyright gives the exclusive right to control the intellectual property by
>
> a) produce a permanent or temporary copy of the intellectual property, regardless of in what way and in what form it happens
> b) make the work available to the public
>
> (Copyright Act, 2018, § 3(a)).

Although it does not fit with traditional knowledge per se, some forms of traditional cultural expression may find protection under this paragraph, e.g. a musical performance, that can be argued to be a temporary copy. In general, the law protects expressions of *individual creation*

(§ 2), but paragraph 8 does open for protection of works created by *cooperation* where the individual contributions cannot be identified or separated into independent works (Copyright Act, 2018).

In 2007 Norway ratified the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* made by UNESCO. The government recognised that acceptance of the convention places a responsibility on the country, particularly in regard to minorities and indigenous peoples, and that cooperation with non-governmental organisations (NGOs) is vital (Familie- og kulturkomiteen [Standing Committee on Family and Cultural Affairs], 2006). The governmental agency *Arts Council Norway*, which administer governmental funds and advise the government (Kulturrådsloven [Arts Council Act], 2013, § 3), was charged with implementing the convention. A report on the then-current situation and on possible actions that had to be taken was ordered, and it was published in 2010 (Arts Council Norway, 2010, p. 4). The report states that several NGOs with interest and capacity within the field already existed, however not on all the topics that the convention is concerned with. An important line of work that had to be initiated was on information about the convention and its consequences, and on future development both on competence and knowledge (Arts Council Norway, 2010, p. 72). Among the concrete efforts the implementation of the convention led to, was the creation of an online database of intangible cultural heritage, *https://www.immateriellkulturarv.no*. It is free to use and open for anyone to contribute to, with Arts Council Norway functioning as an editor. The purposes of the database, in addition to fulfilling the actual requirements that the convention places on the states party to it, is to [my translation]:

- Make different practices and expressions visible to more people
- Lead people to more knowledge on such traditions and practices
- Provide information that increases the demand for locally based customs and traditions
- Increase the recognition of one's own and other's cultural heritage
- Spread good practices with a view to carry forward the knowledge

(Arts Council Norway, n.d.)

4.2.3.2 Other National Attempts to Protect Folklore

The focus on protection for traditional knowledge and expressions of folklore originated in countries in Africa, Asia and South America. Unlike in industrialised countries where works of art and other expressions have a high degree of commercialisation, traditional knowledge has a more prominent position in developing countries where it in many cases still is considered both *living* and *developing*. In addition, it is viewed as a way to showcase their own cultures and traditions and to dissociate from past European colonialism (WIPO, 2001-a, p. 2).

The first national laws on the topic emerged in the late 1960s and onwards. These laws use different choices of words in the definitions, e.g. *works of folklore*, simply *folklore* and *expressions of folklore*. However, the general notions are mostly coinciding as they call for a protection that is different from customary copyright law and the Berne Convention definition of *works* (WIPO, 2001-a, p. 3). Central to the different national laws is that the works, or in other choices of words, protected has an unknown author or originates in a community that belong in the country in question, and that it has been passed on through generations (UNESCO/WIPO, 1985, p. 4). E.g., the *Tunis Model Law on Copyright for Developing Countries* from 1976 define folklore as:

> "Folklore" means all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such country or by ethnic communities, passed on from generation to generation and constituting on of the basic elements of traditional cultural heritage
>
> (UNESCO/WIPO, 1976, Tunis Model Law on Copyright for Developing Countries, Section 18(iv)).

No timeframe of protection is stipulated for this subject matter, because of its by definition perpetual nature. A common concept is that *control* over traditional knowledge and its different expression should be entrusted with the communities concerned, rather than to individual rights owners. In practice the national laws dealing with the subject matter has chosen to authorise different *national bodies* to practise this control, both in the form of NGOs and governmental agencies. One of the tasks these bodies perform is to manage authorisations, particularly when traditional knowledge is used in a commercial interest, and to collect fees in return for authorisation (WIPO, 2001-a, pp. 3-4).

4.2.3.3 African Intellectual Property Organisation

The *African Intellectual Property Organisation* (OAPI) was formed in 1977, and the agreement was lastly revised in 1999. It created a union on matters of intellectual property between seventeen, mostly French-speaking, African countries. The agreement is somewhat unique as it created a system of protection that applies to all the member states and thus eliminates the national sovereignty of each country in the subject matter (Adams & Adams, n.d.; Muheebwa, 2017). In addition to accepting the provisions of several international treaties on intellectual property, like the Berne Convention, Rome Convention and the TRIPS Agreement, the agreement have several provisions regarding *expressions of folklore* and on *cultural heritage* in general. Article 2(xx) in Annex VII defines *expressions of folklore* as:

> "Expressions of folklore" means the production of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community, and includes folk tales, folk poetry, folk songs and instrumental music, folk dancing and entertainments as also the artistic expressions of rites and productions of folk art (sic)
>
> (African Intellectual Property Organisation [OAPI], 1999, Annex VII, Article 2(xx)).

The somewhat cumbersome definition above contains several similarities to the work of UNESCO and WIPO, like the focus on the communal aspect and list of subject matter included. In Article 5(xii) the definition is further specified to also include *[…] works derived from folklore.* On cultural heritage in general, Article 67 refer to both material and immaterial categories and include a quite thorough definitions of what is included in the following articles (OAPI, 1999, Annex VII). An additional concept included in the agreement is a *domaine public payant* or *paying public domain* which require payment of a fee for use of material in which the terms of protection has expired (OAPI, 1999, Annex VII, Article 59).

5. Discussion

This chapter discusses the various terminology used to describe the subject matter, and the different utilisation of these that the major stakeholders and others use. Furthermore, the central question of difference in meaning between the terms protection and safeguarding/preservation is debated. Then the current degree of protection offered, both within and outside of the intellectual property system, is questioned. Finally, the considerations to be draw from the discussion is presented.

5.1 Terminology

In dealing with the subject matter the various stakeholders use a wide range of terms including, but not limited to *traditional knowledge*, *folklore*, *traditional cultural expressions*, *expressions of folklore*, *intangible cultural heritage*, *works* and *productions*. In the work of WIPO, the term *traditional knowledge* (TK) is used both in a strict sense to refer to knowledge *as such* and in a broader and more general sense to refer to both technical knowledge and its manifestations, both tangible and intangible. Furthermore, WIPO use two sub-categories, *genetic resources* and *traditional cultural expressions*. The former is not intellectual property in itself but is seen in conjuncture with the knowledge that is related to it, and the latter term encompasses the diverse forms and manifestations that traditional knowledge can take (WIPO, 2010-c, p. 27). In addition, the term *expressions of folklore* are considered a synonym to the latter sub-category but is has gone somewhat out of fashion as the connotation *folklore* has little support in developing countries and among indigenous peoples (WIPO, 2010-c, p. 6). It is recognised that the relationship between traditional knowledge and its expressions is symbiotic and thus should be viewed as a whole. However, the wide range of different stakeholders, states, communities, law systems and policies showcase the complex structure of the matter and warrant the division in WIPOs work into different tracks (Blake, 2001, p. v; WIPO, 2010-c, p. 27). WIPO use the term *intangible cultural heritage* sparsely its own work and then in the context of the intangible manifestations that *traditional cultural expressions* can take (WIPO, 2010-c, p. 25; 2017-b, Annex 2 p. 27).

UNESCO has landed on the term *intangible cultural heritage*, rather than the encumbered term *folklore*. The definition of the 2003 Convention is quite thorough and overlaps both the strict and the broad usage of traditional knowledge that WIPO utilises. The definitions of intangible cultural heritage, traditional knowledge and traditional cultural expressions are broken up and presented below in Table 1. to showcase the similarities.

Table 1. Comparison of definitions

Intangible cultural heritage	**Traditional knowledge**	**Traditional cultural expressions**
[…] the practices, representations, expressions, knowledge, skills […] […] oral traditions and expressions, including language […], performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, traditional craftsmanship.	[…] knowledge, know-how, skills and practices […]	[…] music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives […]
that communities, groups and, in some cases, individuals recognize (sic) as part of their cultural heritage […] and provides them with a sense of identity and continuity […]	within a community, often forming part of its cultural or social identity.	form part of the identity and heritage of a traditional or indigenous community;
[…] transmitted from generation to generation, is constantly recreated by communities and groups […]	that are developed, sustained and passed on from generation to generation […]	are passed down from generation to generation.

(UNESCO, 2003, Article 2(1), Article 2(2); WIPO, n.d.-d, n.d.-f).

The definitions make use of the same words and expressions to define the subject matter. The UNESCO definition of intangible cultural heritage is broader than the other two, both as a result of its overlapping of the other two and due to its more complementary nature. The most noticeable difference is the inclusion of tangible matter in the WIPO definition of traditional cultural expressions such as architectural forms. This extends its scope somewhat beyond the other two and into what in the UNESCO sense would be covered by the 1972 Convention (UNESCO, 1972, Article 1).

5.2 Protection, Preservation and Safeguarding

Both the words *protection*, *preservation* and *safeguarding* are used by the different stakeholders when the situation around traditional knowledge and cultural heritage is concerned. Although they are similar, they have however different meanings.

5.2.1 'Protection' in the WIPO Context

In the context of WIPO, the word protection is used in an intellectual property sense and thus on the protection of traditional knowledge, traditional cultural expressions and genetic resources with related traditional knowledge from misappropriation and misuse (WIPO, n.d.-e). IP protection for this subject matter take on two different, yet related forms.

5.2.1.1 Positive Protection

Positive protection seeks to grant communities the right to control their traditional knowledge and to receive remuneration from any commercial use (WIPO, n.d.-c). To begin with, some form of protection is available within the existing IP-rights system. While IP-rights by definition is individual, the system does not prevent multiple rights owners from cooperating. It is possible for a group or community to form an association or a similar legal body to manage the copyright, similar to how it is shown that national legislation empowers different bodies, NGOs or governmental, to control and authorise use of traditional knowledge on behalf of the community concerned (WIPO, 2005-a, p. 17; 2005-b, p. 18). Unfair competition law can be used to prevent third parties from falsely labelling their products as *indigenously*

made or *authentic*, and *non-disclosed TK*, such as *sacred* or *secret* knowledge can be protected through laws on confidentiality and trade secrets (WIPO, 2005-b, pp. 17.20).

Outside of the IP-rights system other legal concepts may be utilised such as *prior informed consent* and *equitable benefit sharing*. The principle of prior informed consent highlights that third parties most consult TK holders before accessing or using traditional knowledge. On that basis an agreement between the parties should be signed that stipulates conditions, possible consequences and future remuneration. Equitable benefit sharing is a cornerstone of the *Convention on Biological Diversity* (CBD) and states that TK holders are entitled to an equitable share of the benefits from the utilisation of the traditional knowledge associated with genetic resources, as is the topic the convention is concerned with. However, the principle may be used in cases on traditional knowledge and traditional cultural expressions as well (Food and Agriculture Organisation of the United Nations [FAO], 2016; WIPO, 2005-b, p. 23).

5.2.1.2 Defensive Protection

The aim of *defensive* protection is to prevent third parties from obtaining IP rights over traditional knowledge and traditional cultural expressions (WIPO, 2005-b, p. 26). This system is most common in the field of patents. When a patent for a new invention is sought, it is checked against already existing inventions. The knowledge around these existing inventions is called *prior art*, and if the circumstances around the new invention is found to be already known the patent application is turned down. Documenting traditional knowledge in databases as prior art may be a possible solution to prevent new patents from covering that knowledge. However, a condition for knowledge being recognised as prior art is that it is publicly disclosed. This obviously exclude some forms of traditional knowledge. Another possible problem is the lack of a universal set of rules on prior art, particularly the questions around whether *orally disclosed* information is included (WIPO, 2005-b, p. 26; 2010-a, Annex, p. 14; 2010-b, Annex pp. 13-14, 18). Another concept within the scope of defensive protection is a *communal moral right* that could empower the local communities with the right to object to inappropriate use of their traditional knowledge (WIPO, 2005-a, pp. 17, 19).

5.2.2 UNESCO Expressions

The terms *preservation* and *safeguarding* are different from *protection* as they focus on processes of identification, promotion and viability, rather than on the protection of rights and against misuse (WIPO, n.d.-e). In the work of UNESCO both of the former terms have been used but after implementation of the 2003 Convention the word *safeguarding* has been in the front line. In it lies the focus that intangible cultural heritage needs to be kept alive and relevant within the community or group concerned. The relevant community or group are themselves best suited, with possible outside help from the government or NGOs, to safeguard their intangible cultural heritage. The core value is *viability* and to ensure continuous recreating and transmission, through measures as identification and documentation, communication and promotion of knowledge. In this process it is equally important to recognise the living nature of this heritage and that safeguarding practices thus must not hinder this process. Unlike measures on protection or conservation, the goal of safeguarding is not to preserve intangible cultural heritage in a fixed or frozen form that will stop its continuous development through the generations. In this lies also a prerequisite to recognise the customary laws and practises of the communities or groups concerned, especially in relation to sacred or secret knowledge. In this context it is interesting to note an argument (Blake, 2001, p. 52) on the existence of *private domains* within these customary laws, on the contrary to the public domain created by international IP-rights legislation. The inability of these two systems to effectively function together create a situation where any measurements taken on the topic needs to balance the benefits of a rich public domain against that of the customary practises concerning private domains of relevant communities. The safeguarding of intangible cultural heritage is deemed important as it is a source of identity and belonging for a community by linking past, present and future together, both in social and economic value (UNESCO, 2011-a, pp. 3, 10; 2011-b, pp. 3-4, 8; WIPO, 2010-c, p. 29; n.d.-e).

5.2.3 Two Sides of the Same Coin?

Intellectual property rights protection has a long tradition, particularly in the Western world, and while it is of significant value for the protection of artistic and literary works proper, it falls short on fully protecting intangible cultural heritage and its manifestations. Safeguarding

measures, mainly advocated by developing countries, provide protection in another sense but does also highlight situations that may surface IP right problems. The two are however not mutually exclusive (WIPO, n.d.-e).

Documentation of traditional knowledge and its expressions is an important step in safeguarding processes, but it may lead to questions around IP rights. The heritage documented may unintentionally be considered within the public domain or individuals may gain copyright over the form the expression takes. The distinction between *public domain* and *publicly available* is important to note here as accessibility does not imply free use. In this situation there is a possible tension between protection in the IP sense and preservation. On the other hand, though, the public domain can be seen as an important source of inspiration for present-day performers and communities, especially as derivate works fall within the scope of copyright legislation (WIPO, 2005-a, pp. 11, 13-14; 2010-b, pp. 2-3; 2017-b, Annex p. 27).

Protection, both positive and defensive, can provide intangible cultural heritage with some forms of safety and alongside the requirements that implementation of international legislation like the 2003 Convention place on the state parties, the totality of the different types of protection available is significant. The addition of *sui generis* protection systems, e.g. based on the Model Provisions or a *domaine public payant*, can add further types of protection. However, the strong position of international treaties like the TRIPS Agreement which places a strong focus on individuality over that of communities is a challenge.

5.3 The Degree of Present Protection

5.3.1 Copyright

Within copyright legislation traditional knowledge and its manifestations can find protection to some degree, but the basic structures of this legal right do not fit perfectly. Core elements of copyright is the protection of the individual right of authors, the claim of originality and a limitation on the duration of protection. The communal character of traditional knowledge and the fact that it by nature is of old, possibly ancient, origin without an identifiable author does not fit easily within these essentials. Thus, traditional knowledge is by definition fallen within the public domain and invalid for copyright protection. And furthermore, the

protection granted by copyright is to the form, or manifestation, of an idea and not to the idea itself. Traditional knowledge *as such* is consequently not within this scope (Blake, 2001, pp. 14-15). Derivative works or arrangements containing traditional knowledge, as described in Article 2(3) of the Berne Convention (Berne Convention, 1979), is on the other hand protected by copyright as these works are considered new works with a satisfactory degree of originality.

Possible usage of copyright to protect traditional cultural expressions can be argued to some degree. The concept of moral rights, including the right to be identified as the author and the right to object to derogatory treatment, offer some protection. The additional attempts to craft a *communal moral right* might strengthen this concept further (Torsen, 2006). In the *WIPO Performances and Phonograms Treaty* performers of *expressions of folklore* are protected on equal terms as performers of other expressions (WIPO, 1996-b, Article 2(a)). Possibly the most promising aspect of copyright legislation is, however, the option to adapt *sui generis* provisions in addition.

5.3.2 *Sui Generis* Provisions

5.2.2.1 The Model Provisions

The Model Provisions from 1982 was an attempt to create a framework for national *sui generis* legislations. Core characteristics are the emphasis on the communal character of the subject matter, reciprocity between different legislation and the protection against economic misappropriation. By accepting that expressions of folklore could belong both to communities and to individuals, and not just the latter, a clear break with standard copyright law is evident. The notion of reciprocity is also important, particularly as current legislation does not request recognition of the public domain of other countries, and to hinder unwanted commercialisation over national borders (Blake, 2001, p. 52; UNESCO/WIPO, 1985, Section 14). The definition of the subject matter in Section 2 of the Model Provisions is visibly similar to the definitions used for *traditional cultural heritage* and *intangible cultural heritage*, and of particular interest is the notion that only the fourth category of material forms need to be *fixed* in a tangible form. However, the comparison also highlight that the Model Provisions did not seek to protect traditional knowledge *as such*, but rather the different manifestations it could take.

Table 2. The Model Provisions versus other definitions

<table>
<tr><th>Traditional cultural expressions</th><th>Model Provisions, Section 2</th></tr>
<tr><td>[…] music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives […]</td><td rowspan="3">1) Verbal expressions
o Folk tales, folk poetry, riddles
2) Musical expressions
o Folk songs and instrumental music
3) Expressions by action
o Folk dances, plays and artistic forms or rituals
4) Tangible expressions
o Productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware (sic), jewellery, basket weaving, needlework, textiles, carpets, costumes;
o Musical instruments;
o [Architectural forms] (sic).</td></tr>
<tr><th>Intangible cultural heritage</th></tr>
<tr><td>[…] oral traditions and expressions, including language […], performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, traditional craftsmanship.</td></tr>
</table>

(UNESCO, 2003, Article 2(2); UNESCO/WIPO, 1985, Section 2; WIPO, n.d.-f).

5.2.2.2 The OAPI Agreement

Annex VII on *Literary and Artistic Property* of the OAPI Agreement has three different chapters on the protection of copyright, related rights and cultural heritage respectively (OAPI, 1999, Annex VII, Article 1). In addition to including the protection of *expression of folklore* in the chapter on copyright, the chapter on cultural heritage provides a *sui generis* protection to both tangible and intangible cultural heritage, and Articles 68 to 71 stipulate a comprehensive list of the subject matter (OAPI, 1999, Annex VII). On the other hand, it can be argued that an exhaustive definition is dangerous as possible areas eligible for protection and promotion could be left out and thus reducing the overall scope of the text (Blake, 2001, p. 10). The agreement put responsibility both for protecting and promoting copyright, related rights and cultural heritage on each state in question, and Article 73 put in clear text what acts that is prohibited.

> It shall be prohibited to denature, destroy, exploit, sell or dispose of or transfer illegally any or a part of the property that makes up the cultural heritage
>
> (OAPI, 1999, Annex VII, Article 73(1)).

Exceptions to the article above has to be granted by a *competent national authority*, and as such both traditional knowledge and traditional cultural expression find protection within the agreement. Moreover, some provisions on *free use* is included to stimulate further use and dissemination, like the inspirational use of traditional knowledge to create a new work (OAPI, 1999, Annex VII, Article 74).

In addition to the provisions on *protection*, the OAPI Agreement does also include a chapter of *safeguarding* where measures on identification, documentation and viability are stipulated. In this lies moreover a commitment to keep the cultural heritage accessible to the citizens and to support the existence of artists, authors, craftsmen and other creators and cultural initiatives (OAPI, 1999, Annex VII, Article 94 & 95).

Table 3. The OAPI Agreement versus other definitions

Traditional cultural expressions	**OAPI Agreement, Annex VII, Article 68(2)**
[…] music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives […]	(a) literary works of all kinds, whether in oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles; (b) artistic styles and productions: (i) dances, (ii) musical productions of all kinds, (iii) dramatic, dramatico-musical (sic), choreographic and pantomime productions, (iv) styles and productions of fine art and decorative art by any process, (v) architectural styles; (c) religious traditions and celebrations: (i) rites and rituals, (ii) objects, vestments and places of worship, (iii) initiations; (d) educational traditions: (i) sports, games, (ii) codes of manners and social conventions;
Intangible cultural heritage	
[…] oral traditions and expressions, including language […], performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, traditional craftsmanship.	

	(e) scientific knowledge and works: (i) practices and products of medicine and of the pharmacopoeia, (ii) theoretical and practical attainments in the fields of natural science, physics, mathematics and astronomy; (f) technological knowledge and productions: (i) metallurgical and textile industries, (ii) agricultural techniques, (iii) hunting and fishing techniques.

(OAPI, 1999, Annex VII, Article 68(2); UNESCO, 2003, Article 2(2); WIPO, n.d.-f).

5.3.3 Other Forms of Protection

Under the intellectual property concept of industrial property some forms of traditional knowledge and traditional cultural expressions can be protected. The indication of geographical origin or appellation of origin can be used to verify authenticity as it introduces certain application standards and conversely, legislation on unfair competition, like Article 10^{bis} of the Paris Convention (Paris Convention, 1979) prohibits the use of misleading information, like incorrectly labelling a product as indigenously made. Trademarks can address issues on commercial exploitation and ensures correct attribution and prevents distortion. E.g., the *Native American Tribal Insignia*, which is an official database in the United States of America on tribal insignias of Native American tribes that prevents third parties from registering these as trademarks (WIPO, 2005-b, p. 20). In the process of applying for a patent the invention is checked against a body of knowledge known as *prior art*. An increased focus on recognising traditional knowledge as prior art might prevent this knowledge from being commercialised. In the case of *secret* or *non-disclosed* knowledge the practice on protecting trade secrets might apply. Initially this is only available when the potential for commercialisation is present. However, in recognising the customary laws of communities the acceptance of similarly protecting secrets out of cultural and/or spiritual concerns might be considered.

Outside of the intellectual property system the concept of prior informed consent, which builds on the right to self-determination, empowers communities. As an international standard set forth in the *United Nations Declaration on the Rights of Indigenous Peoples*

(UNDRIP) is gives indigenous peoples the rights to give, withdraw or withhold consents and to negotiate conditions on projects that concern them and their cultural knowledge (FAO, 2016, pp. 12-13). The additional concept of equitable benefit sharing as stipulated in the CBD Convention entitles concerned groups to a fair share of the benefits when utilising genetic resources and its associated traditional knowledge.

5.4 Considerations

5.4.1 A Long Process of Recognition

The process of recognising intangible cultural heritage and traditional knowledge as something worthy of protection and safeguarding has been a long journey. From the ruins of the First World War and the initiatives of the League of Nations to the 2003 *Convention for the Safeguarding of Intangible Cultural Heritage*, the issue has shown its significance. The conflicting interests of the industrialised and commercialised western world versus that of developing countries and indigenous peoples have showcased the importance of the United Nations agencies in arbitrating international measures to satisfy both concerns. In adding matters concerning intangible cultural heritage and traditional knowledge to the workload of UNESCO and WIPO in particular, the aspiration for international legal instruments has gained momentum. Recognition of the conventions of 1972 and 2003 have put measures of safeguarding and preservation of both tangible and intangible cultural heritage on the agenda and the TRIPS Agreement has provided nearly worldwide acceptance of the Berne, Paris and Rome Conventions. However, other projects like the 1982 Model Provisions has had little direct impact (Blake, 2001, p. 19). In the absence of a uniform international legal instrument addressing IP protection of traditional knowledge and its manifestations, regional and national laws and conventions, like the OAPI Agreement, have included *sui generis* provisions in attempts to cover the gaps. However, a core activity of the major stakeholders are the processes of defining the subject matter.

5.4.2 Understanding the Subject Matter

When comparing the definitions of the UNESCO term *intangible cultural heritage* and the WIPO terms *traditional knowledge* and *traditional cultural heritage*, including the latter's

synonymous term *expressions of folklore*, a number of similarities are clearly visible. The highlighting of the communal character and the process of delivery over several generations are but two striking parallels. The inclusion of some tangible aspects of traditional cultural expressions show a link to the 1972 Convention on protection of cultural and natural heritage in the material form. The resemblances are not surprising as the two organisations often work in close cooperation, e.g. the Model Provision and the Tunis Model Law. However, in this cooperation there is an important division of labour as UNESCO focuses on safeguarding in the broad spectre while WIPO concentrates on questions surrounding intellectual property (Blake, 2001, p. v). A potential source of discussion in this twofold approach is the understanding that the rationale for protection, whether within the intellectual property system or not, should not be to stop the living process of transmitting traditional knowledge by fixing it to a form where further development is made difficult or impossible. The core characteristic as a living form of heritage is central to uphold while on the other hand giving communities or individuals, as possible rights holders, the means to control usage. Commercial use as such is not necessarily negative, but the right to consent or object to it, and to receive fair remuneration, is key. Recognition of customary laws and that some traditional knowledge is of a secret or sacred nature is an additional aspect that stress the complex nature of the subject matter.

5.4.3 Range of Protection

The broad range of protection schemes within the intellectual property system, both concerning copyright and industrial property, have as shown the potential to give certain aspects of intangible cultural heritage and traditional knowledge various degrees of protection. However, fundamental characteristics of the system oppose the nature of intangible and traditional heritage. With this in mind the question of whether copyright in particular is a fitting system to utilise is brought to mind (WIPO, 2001-a, p. 5). The adoption of *sui generis* provisions in addition to copyright and industrial property protection might solve some gaps. The OAPI Agreement is one such attempt.

Safeguarding measures as implemented by legislation like the 2003 Convention stipulate another form of protection. In keeping within the recognition of the living nature of the

subject matter the convention is concerned with the viability of the intangible cultural heritage of the world. It places requirements on the state parties to:

> […] identify and define the various elements of the intangible cultural heritage present in its territories […]
>
> (UNESCO, 2003, Article 11(a)).

This collection process should be done in cooperation with communities and NGOs, and inventories of the intangible cultural heritage documented shall ensure preservation while also stimulating further dissemination and development.

6 Conclusion

6.1 Concluding Remarks

This study sought to discover the current situation on protection of intangible cultural heritage. During the process, the understanding of the scope of the subject matter increased. In starting out from an interest in folk music and the challenges of commercialisation and exploitation it faces, the realisation that the challenges indeed also included other aspect of cultural heritage grew. With this newfound consciousness the range of the study increased to include cultural heritage as a whole, with a particular view on intangible cultural heritage.

By looking at the history of UNESCO and WIPO, and on their work, the understanding that the subject matter had a long history of upturns and downturns emerged. Success stories like the Berne Convention and the 1972 Convention combined with the failure of the 1989 Recommendation and the limited range of the 1982 Model Provision showcased a wide spectre. In reviewing the work of these organisations, the division of labour between them was clear: WIPO concentrates on questions of intellectual property while UNESCO overlook the matter as a whole. In this division lies also the understanding that protection and safeguarding/preservation is not identical and have different issues. On the other hand, though, it is important to note that they are not mutually exclusive.

The organisations utilise a broad range of terminology and while these may seem fundamentally different, there are in fact several similarities. UNESCO have after much consideration landed on the term *intangible cultural heritage* and as the study have shown, it is relatively broad while simultaneously having concrete aspects. WIPO on the other hand uses several terms and splits the subject matter into several categories: *traditional knowledge* is used in two senses, a broad sense that encompasses the whole spectre including manifestations and a strict sense on knowledge *as such*, and *traditional cultural expression* or *expressions of folklore* refer to the manifestations that traditional knowledge take. The third category *genetic resources* do not refer explicitly to creations of the mind but rather the body of traditional knowledge associated with it. This latter term is somewhat on the outskirts of the scope of this study but does provide some insight into the intellectual property concept of industrial property. When combining the terminology above and their definitions one realises the interconnected nature of the two organisations and their interest in the same subject matter, however with different specific fields of interests.

When dividing the perception of protection into two categories, protection in the IP sense and as safeguarding/preservation, the core question of this study become twofold. In the latter case the failure to include intangible cultural heritage in the 1972 Convention created somewhat of a hierarchical division where tangible aspects where viewed as more valuable, at least in the West. This was however corrected, and rightfully so, by the implementation of the 2003 Convention where intangible cultural heritage is safeguarded on an equal basis to tangible cultural and natural heritage. The question of IP protection is on the other hand more ambiguous. The study has shown that traditional knowledge, and then mainly its expressions, may find some degree of protection under copyright and industrial property legislation. However, the characteristic elements of particularly copyright, like demands on individuality, originality and a limited timeframe of protection, are major obstacles. This has led to effort to make *sui generis* provisions specifically suited for protection of intangible and traditional knowledge and expressions, but these are as of yet only of regional and national scope. Other concepts like prior informed consent and equitable benefit sharing may provide additional protection.

Intangible cultural heritage is on the paper well protected by the safeguarding measures of 2003 Convention and the fact that 175 countries have ratified it (UNESCO, 2017-b). However, the protection given internationally by intellectual property legislation has obvious flaws and imperfections. The continuous effort of both UNESCO, WIPO and other countries, groups and organisations to strengthen the legislative protection is consequently much needed.

6.2 Limitations and Suggestions for Further Research

In the process of conducting this study, some limitations arose. The term indigenous peoples are mentioned, both as a source where traditional knowledge resides and as a concerned party. Concerning these particular groups, however, a different set of issues and legal aspects apply, which could be a source of further study. Other organisations, like the United Nations Commission for Trade and Development (UNCTAD), are also involved in matters concerning protection of traditional knowledge (Blake, 2001, p. 51) and could be a topic of another research. A closer look on the national implementation of international conventions and of *sui generis* provisions are equally interesting.

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