

## *Paper Proposal*

### Intangible Cultural Heritage Data Flows and Intellectual Property Regulation: Mitigating Fairness and Morality Hitches<sup>1</sup>

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#### **Introduction**

“Intangible cultural heritage” (ICH) means 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 as part of their cultural heritage.<sup>2</sup> ICH is spread through generations and constantly recreated. In this sense, it ensures humanity with a sense of identity and continuity.<sup>3</sup> ICH has become fragile in the face of growing globalization, and the living expressions inherited from ancestors and passed on to descendants are at great risk of disappearance. To palliate to this threat, UNESCO has requested each State party to take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory<sup>4</sup>, as well as the integration of the safeguarding of such heritage into planning programmes.<sup>5</sup> “Safeguarding” means measures aimed at ensuring the viability of the intangible cultural heritage, as well as the revitalization of the various aspects of such heritage.<sup>6</sup> Digitizing represents a safeguarding measure in line with the UNESCO

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<sup>1</sup> Proposal submitted for presentation during the 37<sup>th</sup> Annual Congress of the International Association for the Advancement of Teaching and Research of Intellectual Property.

<sup>2</sup> Art 2(1) UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, Paris Act, 2003

<sup>3</sup> Tudorache Petronela, “The importance of the intangible cultural heritage in the economy.” *Procedia Economics and Finance* 39 (2016) 731

<sup>4</sup> Art 11 UNESCO ICH Convention 2003

<sup>5</sup> *Ibid.* Art. 13

<sup>6</sup> *Ibid.* Art.2(3)

Convention for the Safeguarding of Intangible Cultural Heritage. Etymologically, digitization comes from the Latin words *digitize* and *ation*, which refer to the action of converting text, pictures, or sound into a digital form that can be processed by a computer.<sup>7</sup> New digital technologies offer a practical means to document, record and digitize expressions of traditional cultures.<sup>8</sup> If the safeguarding system is designed to strengthen and perpetuate the social and cultural rights of the communities concerned<sup>9</sup>, Intangible assets of cultural capital exist as a capital stock held by a country, a region, a city, or an individual economic agent. This capital could be assigned an asset value in both economic and cultural terms.<sup>12</sup> In this vein, several cultural websites offer digitized ICH catalogues as well as online services for the production, export and import of elements of ICH regardless of its form.

Intellectual property protection protects those creations and innovations from misappropriation and misuse. To fulfill this aim, intellectual property is organized in international conventions, national laws, such as the laws of copyrights, trademarks, patents, and designs. WIPO (The World Intellectual Property Organisation), specialized agency of the United Nations in the field of intellectual property, works restlessly to promote effective protection of IP in fairness to all nations worldwide.<sup>13</sup>

Fairness may be defined as impartial and just treatment or behaviour without favouritism or discrimination. According to Cambridge English Dictionary, dealing with a situation in all <sup>14</sup>The digital world makes ICH contextualizing easier, responding to the desire of indigenous communities to promote their cultural heritage. Meanwhile metadata standards and interoperability enable third parties access to ICH content with potential uses such as creation of personal virtual collections in minutes, re-use and sharing at zero cost.

In a first part, this article describes digitization of living traditions embodying both communal creativity and individual artistic expression, and the inevitable. In a second part, this article establishes the link between data flows and the need to protect countries' ICH

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<sup>7</sup> <https://en.oxforddictionaries.com/definition/digitization>

<sup>8</sup> Digitizing Traditional Culture, WIPO Magazine, June 2008. Available at [http://www.wipo.int/wipo\\_magazine/en/2008/03/article\\_0009.html](http://www.wipo.int/wipo_magazine/en/2008/03/article_0009.html). Accessed on 11/1/18.

<sup>9</sup> Christoph Antons, William Logan, *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge 2018.

<sup>10</sup> Abdulqawi A. Yusuf, *Standard-Setting at UNESCO: Normative in Education, Science and Culture*. Vol.1. Brill 2007. P. 257

<sup>11</sup> *Ibid.*

<sup>12</sup> Guido Licciardi, Rana Amirtahmasebi, *The Economics of Uniqueness: Investing in Historic City Cores and Cultural Heritage Assets for Sustainable Development*. The World Bank . P.48.

<sup>13</sup> World Intellectual Property Organization. Available at [geneva.mfa.gov.ua/en/ukraine-io/wipo](http://geneva.mfa.gov.ua/en/ukraine-io/wipo). Accessed on 11/1/18.

<sup>14</sup> <https://dictionary.cambridge.org/dictionary/english/fairness>. Accessed on 11/1/18

<sup>15</sup> Jerome H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 *New York University Journal of International Law & Politics* 11-93 (1996)

and ICH holders' interests as well. In this part, this analyses the risks of reliance on ICH data and Big data and the related issues of data authenticity and ICH holders right to privacy.<sup>19</sup> This part questions the fairness of the response of international digital law and IP Systems to the growing flow of ICH Data. This part goes further to consider the trends of Data protection with careful consideration of changes over time in IP-ICH regulatory frameworks, from pre-Internet times, to recently updated ones.

The paper concludes with recommendation of IP management of digitized intangible cultural heritage to prevent unwanted exploitation and mitigate the related risks of unauthentic cultural data. This could be a step towards fairness..

## DRAFT OUTLINE

1. Intangible Cultural heritage, Digitization, and intellectual property: Unveiling concepts and Terminology
  - 1.1. Defining ICH: Nature and Features.
  - 1.2. Case Studies: Africa, Asia, Europe
  - 1.3. The Dual Nature of Digitization
    - 1.3.1. Digitization as a safeguarding measure
    - 1.3.2. Digitization as tool to promote ICH
  - 1.4. Online Flow of ICH Data
  
2. Identifying ICH Digitization Related Risks

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<sup>16</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is negotiating international legal instrument(s) on intellectual property (IP) and GRs, TK and TCEs. Available at [www.wipo.int/tk/en/](http://www.wipo.int/tk/en/)

<sup>17</sup> WIPO DL101 Course. Module 1: Introduction to Intellectual Property. P.3

<sup>18</sup> See e.g Tudorache Petronela, "The importance of the intangible cultural heritage in the economy." *Procedia Economics and Finance* 39 (2016) 731 – 736 (Showing The importance of intangible cultural heritage refer to the wealth of knowledge and skills that is transmitted from one generation to the next ones); Guido Licciardi, Rana Amirtahmasebi, "The Economics of Uniqueness: Investing in Historic City Cores and Cultural Heritage Assets for Sustainable Development". *The World Bank* . P.48 (Presenting intangible cultural heritage as economic asset for poverty alleviation); F. Calabrò and L. Della Spina, "The Cultural and Environmental Resources for Sustainable Development of Rural Areas in Economically Disadvantaged Contexts - Economic-Appraisals Issues of a Model of Management for the Valorisation of Public Assets", *Advanced Materials Research*, Vols. 869-870, pp. 43-48, 2014 (Presenting that Ignoring the economic value of cultural resources, their conservation, costs and total benefits of cultural policies and investment projects with a strong cultural component, can lead to non-optimal allocation of resources, to degradation of cultural capital and to failure to exploit opportunities for development

<sup>19</sup> Mira Burri, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation* .UC Davis Law Review, Vol. 51, 2017, p. 68.

- 2.1. Impact of Metadata and Interoperability Rules
- 2.2. Digitization Techniques and Copyright Issues
- 2.3. Access to ICH Content
- 2.4. Data Authenticity
- 2.5. Misuse, Copy and Misappropriation of ICH Content
- 2.6. Right to Privacy of ICH Holders

### 3. Questioning the Fairness in Intellectual Property Regulation

- 3.1. Existing IP Protection
- 3.2. WIPO-IGC
- 3.3. International Laws for Data Flow

### Conclusion

- Summary
- Recommendations.