Unit 55

Workshop on policy development for intangible cultural heritage safeguarding

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# Facilitator’s narrative 4: A secret tapestry is made available to the public (CASE STUDY 46)

This case study can be used to prompt a discussion about:

1. the relationship between ethics and law,
2. the possibilities and limitations of conventional IP protection for ICH or TCEs, (the reason why sui generis IP regimes are sometimes implemented), and
3. in the absence of sui generis IP regimes, ways of using contracts, ethical guidelines and moral rights regimes to help safeguard ICH.

### Who owns rights in the work: the artists or the community?

Workshop participants should be able to establish that, because each tapestry reinterprets the traditional design, the three women who created it years ago would have jointly owned the copyright in their work, or at least in the original aspects of their design. The bar for creativity and originality in copyright is quite low, so any modification of a work would be considered original. (Aspects of a design that are copied exactly from another work would not be protected by copyright, however. This means that the copy made by the artist is not an original work, except for the title.)

When an author dies, their heirs may inherit the copyright for the remainder of its duration. Copyright may also be assigned to third parties, and/or the rights conferred by copyright may be licensed or given to third parties by contract. The Bobinian community as a whole would not have had any intellectual property rights over the work unless the three women had for example assigned the copyright to a community organization, which is not mentioned in the facts. In any case, the copyright in the work has now expired because all three of the women died over 50 years ago.

The work is thus in the public domain, in an intellectual property sense, and can freely be used by others if they are given access to it, under the law of Bobin. Participants can have a discussion about whether it should be the case that traditional works enter the public domain in this way, or whether communities should be given some rights to protect such works. The facilitator can use the Draft Articles on traditional cultural expressions to explain how sui generis regimes for intellectual property protection could effectively reclaim some works from the public domain.

#### **Law and ethics: what did the museum do wrong?**

Simply having a work in its possession does not give any institution the right to make it public, if it is still under copyright and the institution does not own the copyright or have the agreement of the copyright owner. Even if the work is out of copyright, other factors should be considered when making it public. Ethical guidelines can help museums make choices in such cases.

Making the tapestry public is likely to negatively affect the practice of the ICH associated with the tapestry, namely the spring festival, and the relationship between the Bobinians and the museum. After all, it was only through a relationship of trust with the museum anthropologist that the tapestry came into the museum in the first place. In spite of the fact that the tapestry is now in the public domain, from an ethical perspective, knowing the significance of the tapestry for the community concerned, the museum should have consulted with them before making it available online, and taken their views into consideration. From a legal perspective, the museum is also bound by their contract with the Bobinians (i.e. to conserve it but keep it from public display).

#### **Reusing a work in the public domain: what did the artist do wrong?**

The artist took the material from the museum website, where it was described as open access, and it is out of copyright. He is not therefore infringing any copyrights in the tapestry. However, since he has access to information about the significance and use of the tapestry to the Bobinians, he is well aware of the effect that further publicizing the tapestry would have, and by naming it ‘death of springtime’ he put it in a new and derogatory context, alluding to the fact that by making the artwork he was (symbolically) destroying the crops in the community.

Participants could discuss whether the artist is justified in doing so as he is an artist specifically aiming at raising controversial issues in society. Arguably, the heirs and/or the Bobinian community could pursue legal action against the artist under ‘hate speech’ or ‘mutual respect’ provisions in human rights law, if these exist in the country, because the artwork was created with the knowledge of likely negative effects on the traditions and cultural wellbeing of the community. In Australia, for example, ‘cultural harm’ is actionable, but in most countries the heirs of the women who created the tapestry and the community would have to rely on limitations imposed on free speech.

In Bobin, provisions are made for the protection of moral rights in the work which have no time limit, and these echo some of the provisions in sui generis instruments. The descendants of the three women (not the community) could sue the artist under the moral rights provisions for (a) not naming the women as authors, and (b) for renaming the work ‘death of springtime’, i.e. changing the context of the work in a way that negatively affects its meaning.

#### **Possible courses of action**

From a safeguarding point of view the Bobinian community will need to assess the effect of the museum’s and the artist’s actions on the viability of their ICH, specifically the use of the tapestry in their spring festival. They may have strategies to mitigate the disclosure of the tapestry, for example to make ritual accommodations (amend the ceremonies in the spring festival that year or conduct other ceremonies), or they may choose simply to destroy this tapestry and make another one.

Community members may (or may not) wish to meet with the museum and/or the artist to express their dissatisfaction with the misuse of their tapestry, receive their apology(ies) and discuss what can be done. The Bobinians could decide to continue their arrangement with the museum under improved conditions with a new or the existing tapestry, or terminate it and do their own conservation work on this tapestry, or any new one. They may require the destruction or removal from public view of the copy made by the artist (or pursue legal action against him), or by making a new tapestry they may take away the power of his artwork and make an example of his disrespectful behavior in the media.

From a legal and ethical point of view, since the image of the tapestry has been made public in breach of contract, the most important thing for the museum to do immediately is to apologize to the Bobinian community (including the heirs of the authors), and remove it from the website. The museum should also inform the artist that the work was wrongly made available to the public, and ask him to remove his artwork from public display. The museum should then investigate what went wrong with its internal processes that permitted such a problem to have occurred.

In order to prevent such a situation recurring, the museum will have to tighten up its controls over enabling digital access to materials that are culturally sensitive. The Bobinian community may choose to manage its relationship with the museum differently in future, for example insisting on tighter controls over the use of the tapestry through regular communication and oversight. The artist has made his name by being deliberately provocative, and clearly meant to offend by naming his artwork in that way. It is difficult to predict how he will respond to complaints from the community or the museum, negative media exposure or legal action; perhaps this will make him more sensitive and careful in future.

#### **Further information:**

In preparation for this case study participants could be encouraged to read this basic overview:

* WIPO, Traditional Knowledge and Intellectual Property (also in Arabic, Chinese, French, Russian, and Spanish): <http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk_brief1.pdf>
* Facilitators may find this more detailed analysis useful: WIPO, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (also in Arabic, Chinese, French, Russian, and Spanish): <http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf>
* More background on IP can be found in the following: WIPO Intellectual Property Handbook, p.40ff <http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf>
* For a discussion on the public domain see WIPO, 2010. ‘Note on the Meanings of the Term "Public Domain"’ <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_8.pdf>
* For more information on intellectual property rights management in museums see WIPO, Legal Issues and Practical Options for Museums, Libraries and Archives (translated into English, French and Spanish): <http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf>
* For a discussion on ethics guidelines pertaining to ICH safeguarding see UNESCO 2015, ‘Towards codes of ethics for intangible cultural heritage’ (<http://www.unesco.org/culture/ich/index.php?lg=en&pg=00015&key=809>)