



ASSOCIATION OF
RESEARCH LIBRARIES



July 21, 2010

Justin Hughes
Senior Advisor to the Under Secretary of
Commerce for Intellectual Property
U.S. Patent and Trademark Office
600 Dulaney Street
Alexandria, VA 22313

Re: WIPO Revised Provisions for the Protection of Traditional Cultural Expressions

Dear Mr. Hughes:

Thank you for providing the Library Copyright Alliance (LCA) with the opportunity to provide comments on the WIPO Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (WIPO/GRTKF/IC/16/4). As you know, librarians are concerned about establishing a WIPO treaty to protect traditional cultural expressions (TCEs). We believe such a treaty would have a negative impact on the public domain, intellectual freedom, access to information held in library collections, and our ability to meet the educational and research needs of the communities we serve. Western intellectual property law will never effectively correspond to the unique nature of TCEs. Attempting to force such harmony is likely to produce a host of unintended consequences. Furthermore, libraries and other cultural institutions have both policies and practices in place that recognize and respect the nature of TCEs and their importance to indigenous peoples. Libraries successfully collaborate with indigenous people to devise ownership and access policies that are mutually acceptable. These relationships have clarified understanding between librarians and indigenous communities and have promoted shared respect. The following are more specific comments on the Revised Provisions.

Overly Broad Scope of Traditional Cultural Expressions/Expressions of Folklore (Article 1)

The Revised Provisions include "indigenous and traditional cultural expressions" as well as "national" folklore as protected works. The inclusion of such a broad range of works encompasses too many cultural works, many previously open and accessible to the public, such as architectural forms like the pyramids. Understanding what a traditional expression is, if only understood as "traditional" by the traditional community itself, creates uncertainty. One might not know if a TCE is traditional until after the fact, leading to further confusion regarding lawful use.

Compounding the problem of the breadth of the kinds of works protected is the absence of limitation on which communities' expression would be protected. The Revised Provisions speak of "indigenous peoples and communities and traditional and other cultural communities." Does "traditional and other cultural communities" include religious groups? Is the Old Testament the cultural expression of observant Jews? Is the New Testament the cultural expression of Roman Catholics? The Koran the cultural expression of Muslims? What happens when more than one community claims a particular expression, e.g., Protestants and Catholics claiming the New Testament? Or when one group's cultural expression is based on other groups' expression, e.g., the passages of the Koran that derive from the Old and New Testaments?

Preserving the Public Domain (Article 6)

The WIPO Revised Provisions propose that registered TCEs have perpetual copyright protection as long as they are being maintained by their indigenous communities. This proposal would extend to other traditional and cultural communities, thereby including a great body of works that have always been considered public domain, such as American folk tales, labor and civil rights songs, fairy tales, holiday customs, and religious texts such as the Old and New Testaments, the Koran, and the Bhagavad Gita. Since any derivatives of these works would also have perpetual protection, the extent of cutting into the public domain is considerable. Under such a model, it would be even more difficult to ascertain the boundaries of the public domain because the termination date would be determined by the indigenous group maintaining the culture, unbeknownst to the public.

Unregistered TCEs would also be protected indefinitely against "any distortion, mutilation, or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community..." Any use that is perceived by the community as critical would fall within this sweeping definition.

Determining what materials are in the public domain is already woefully difficult, and further uncertainty will hamper the use and preservation of such works. A rich and growing public domain provides new opportunities for research and creativity and must be protected.

Registry Threatens Intellectual Freedom, First Amendment Freedoms and User Exceptions in the Copyright Law (Article 3)

In order to limit misappropriation and misuse of TCEs, the WIPO Revised Provisions establish a TCE and folklore registry, where any use of a TCE "of particular cultural or spiritual value to a community" must be first approved and licensed by the indigenous or traditional community. Such a provision seriously restricts intellectual freedom, freedom of expression, and exceptions to copyright law. A fundamental tenet of librarianship is commitment to intellectual freedom, and so it is unacceptable to compel researchers and scholars to seek prior approval to use a traditional cultural expression. Free expression is a basic democratic value guaranteed to us by the Bill of Rights. Prior approval is incompatible with fair use. The revised provisions propose that even when traditional cultural expressions are not voluntarily included in the registry, users may

have allowances to use TCEs, but *how* TCEs can be used is still subject to prior authorization.

Provisions Undermine Preservation of Cultural Heritage (Article 5)

Libraries play a primary role in preserving the cultural record to benefit all of humanity. Preservation of works without some form of access to these works is a futile exercise. When libraries acquire indigenous cultural works, they frequently engage in negotiations with the indigenous communities to honor access policies that adhere to cultural beliefs. When agreements cannot be made, libraries return materials to indigenous communities and seek ways to help the community preserve their own culture, drawing on librarian expertise. These relationships allow indigenous people a high degree of control over access to and preservation of their cultural works, particularly those of a sacred nature. These arrangements are dealt with on a case-by-case basis since indigenous communities differ in the ways that access to cultural works is allowed, often relying on the opinion of tribal elders.

Exceptions and Limitations are Inadequate and Threaten Free Expression (Article 5)

While it is comforting to know that exceptions were considered in the Revised Provision, the caveat that all uses must not be offensive significantly restricts the utility of the exceptions. Any use that the community disagrees with or that criticizes the community in any way could be viewed by the community as offensive. Not knowing what might be offensive is another problem for people outside of the traditional culture.

Transitional Measures (Article 9)

The Revised Provisions would apply to TCEs created before the treaty is ratified, leading to removal of cultural works from libraries, archives and other cultural institutions, as well as the public domain. The possibility of reclaiming TCEs that had not previously been managed and maintained by an indigenous group is a possibility, making removal of works from libraries and archives a continuing possibility. Library users have understood that these works would be available to them. While we respect and understand that indigenous communities might not recognize a “public domain” because their cultural works are “living” works, it will be difficult for librarians to view removal of works as anything other than an act of censorship.

In conclusion, we hope that this treaty does not move forward in its existing form. Libraries successfully work with indigenous communities to identify the best ways that cultural works can be available and preserved while respecting cultural diversity. An additional law will not add any value to our existing mutually accepted arrangements. U.S. libraries understand that only by continuing partnerships with indigenous peoples will we identify overlapping consensus and mutually acceptable ways of working together. Our library associations’ by-laws and policies iterate library values as well as values of diversity. Currently, the American Library Association (ALA) is developing a “principles” document on the management and protection of TCEs, a policy document of great importance to both librarians and U.S. tribal communities. Such a policy statement has already been endorsed by the Alaska and Montana Library Associations.

In addition, ALA maintains a Web site on TCEs (<http://wo.ala.org/tce>) to further discussion in the library community on respectful caretaking of traditional cultural expressions and to explore joint stewardship of cultural heritage collections.

Please let us know if you have any questions.

Respectfully,

A handwritten signature in black ink that reads "Jonathan Band". The signature is written in a cursive, slightly slanted style.

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, DC 20036

On Behalf of the Library Copyright Alliance

The Library Copyright Alliance is a coalition of library associations made up of the Association of Research Libraries¹, the American Library Association², and the Association of College and Research Libraries³. More information about LCA is available at <http://www.librarycopyrightalliance.org/>.

¹ The Association of Research Libraries (ARL) is a nonprofit organization of 125 research libraries in North America. ARL's members include university libraries, public libraries, and government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve (<http://www.arl.org/pp/index.shtml>).

² The American Library Association (ALA), established in 1876, is a nonprofit professional organization of more than 65,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society (<http://ala.org/>).

³ The Association of College and Research Libraries (ACRL), the largest division of the ALA, is a professional association of academic and research librarians and other interested individuals. It is dedicated to enhancing the ability of academic library and information professionals to serve the information needs of the higher education community and to improve learning, teaching, and research (<http://www.acrl.org/>).