

WORLD INTELLECTUAL PROPERTY
ORGANIZATION

世界知识产权组织

ORGANIZACIÓN MUNDIAL
DE LA PROPIEDAD INTELECTUAL



ORGANISATION MONDIALE
DE LA PROPRIÉTÉ INTELLECTUELLE

المنظمة العالمية للملكية الفكرية

ВСЕМИРНАЯ ОРГАНИЗАЦИЯ
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

January 17, 2006

Dear Mr. Javier Hernandez-Ros,

With reference to the “i2010: Digital Libraries” Communication adopted by the European Commission on September 30, 2005, and in response to the invitation to provide comments on the Communication before January 20, 2006, please find enclosed certain information provided by the Secretariat of the World Intellectual Property Organization (WIPO).

We hope that this information is of interest and assistance. For purposes of any enquiries or further information, please contact my colleagues Mr. Wend Wendland, Deputy Director and Head, Traditional Creativity and Cultural Expression Section, Global Issues (Traditional Knowledge) Division, at telephone: +41 22 338 9924, telefax: +41 22 338 8120 and email: wend.wendland@wipo.int and Ms. Geidy Lung, Senior Legal Officer, Copyright and Related Rights and Industry Relations Sector, Copyright Law Division, at telephone: +41 22 338 9553, telefax: +41 22 338 9070 and email: geidy.lung@wipo.int

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R. Hayes'.

Rita Hayes
Deputy Director General

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Francis Gurry'.

Francis Gurry
Deputy Director General

Mr. Javier Hernandez-Ros
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Information Note
prepared by the
Secretariat of the World Intellectual Property Organization (WIPO),
January 17, 2006

on the
“i2010: Digital Libraries” Communication
Adopted by the European Commission
on September 30, 2005

Introduction

1. This Note provides information on certain programs and activities being carried out by the World Intellectual Property Organization (WIPO)¹ relating to some of the issues raised by the “Digital Libraries Initiative” referred to in the European Commission’s i2010: Digital Libraries Communication of September 30, 2005.²
2. Intellectual property (IP) protection refers, in brief, to the protection of the results of creative intellectual activity against misappropriation and misuse within the bounds set by public policy considerations and the general public interest.³
3. Museums, archives and libraries play an invaluable role in the provision of access to information and knowledge and preserving the rich cultural heritage of our planet and promoting cultural diversity. Initiatives to digitize cultural heritage collections and make them widely accessible, such as the i2010 Digital Libraries Initiative of the European Commission, hold the promise of promoting cultural exchange and diversity; supporting museum, library and archival services; advancing scientific and scholarly progress; facilitating educational opportunities; improving accessibility for people with disabilities; and, promoting creativity and innovation.
4. IP issues can arise at every stage of the collection, cataloguing, inventorying, recording, digitization, display and re-use of cultural heritage materials or other creative contents by cultural institutions and initiatives.

¹ WIPO is the United Nations agency responsible for the promotion and protection of creative intellectual activity and for facilitating the transfer of technology in order to accelerate economic, social and cultural development. It has 183 Member States, who decide on, direct and monitor its programs. See <http://www.wipo.int/portal/index.html.en>

² The Note has been prepared by the Secretariat of WIPO and does not seek to preempt or represent the policy positions that Member States may wish to adopt on the various issues raised by the Communication. Any views expressed in this Information Note paper are not necessarily those of WIPO or any of its Member States.

³ IP systems are diverse in character, but they generally aim at giving the originators of intellectual works a say over whether, and if so how, their works are used by others; providing for acknowledgement and respect for originators; and, appropriately sharing the benefits of use of their works - so addressing both economic and cultural interests. IP is a versatile and adaptable tool that can be used strategically to advance a range of IP-related objectives in line with broader public policy and national and regional development goals.

5. Referring to IP questions is not intended to complicate or restrict but rather complement and support digitization and other cultural heritage safeguarding projects. Clarifying IP issues and options in relation to safeguarding cultural heritage could strengthen synergies between the protection of cultural documentation and its preservation, promote creativity, enhance respect for creative endeavors and traditional cultures, further educational and scholarly opportunities, and promote the wide, secure and fair exchange of information, knowledge and cultural expressions between the peoples and communities of this culturally rich and diverse world.

6. This Note provides information on two specific issues addressed in WIPO programs and activities, namely (i) copyright and related rights and (ii) the protection of traditional cultural expressions and knowledge.

Copyright and related rights

7. Certain aspects of the operation of museums, archives and library institutions have been affected by important shifts regarding technological developments and the consequent reshaping of the protection of works or other subject matter of related rights in the global information infrastructure. Some of them are worth mentioning in particular.

8. The first shift is that relating to the creation of new rights in respect of digital uses of works.⁴ The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), or the WIPO Internet Treaties, which entered into force in 2002,⁵ expressly record the agreed principle that storage of protected works in computer memories is considered a reproduction.^{6,7} They also establish that the interactive communication of a work, a performance or a phonogram must be covered by exclusive rights for the creator. Countries retain flexibility to determine which right and scope will apply in national law, but the protection granted must cover the act of making available to the public works or objects of related rights in such a way that members of the public may access them from a place and at a time individually chosen by them.⁸

9. Another important change brought by the WIPO Internet Treaties concerns limitations and exceptions, a matter of ever-increasing importance and subject of

⁴ The term "works" in this note includes objects of related rights.

⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. serves in particular to implement some of the new international obligations of the European Union member States following signature of these WIPO treaties.

⁶ See Report of the Second WIPO/Unesco Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, June, 1982 (document UNESCO/WIPO/CEGO/II/7).

⁷ Article 1(4) of the WCT and its Agreed Statement, and similar Statements to Articles 7 and 11 of the WPPT.

⁸ Articles 8 of the WCT, and 10 and 14 of the WPPT.

intense worldwide debate today. Being based on the particular social or economic needs that apply, limitations and exceptions to the scope and exercise of copyright and related rights vary from one country to another. Such diversity has been permitted at international level, notably by the standards provided by the Berne Convention for the Protection of Literary and Artistic Works⁹ and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations¹⁰, and more recently by the Internet Treaties. The latter permit national legislation to maintain or extend the traditional limitations and exceptions, and even to devise new ones for the digital environment, provided that there is compliance with the three-step test, that is to say, that limitations or exceptions to rights can only be introduced in certain special cases, when they do not conflict with a normal exploitation of the work or object of related rights, and when they do not unreasonably prejudice the legitimate interests of right owners.¹¹

10. A third key change introduced by the WIPO Internet Treaties relates to technological measures of protection and rights management information, the protection of which is assured by a set of obligations assumed by the Contracting Parties. These obligations are designed to ensure that rightholders may effectively use technology to protect their rights and to license their works online. The first obligation requires countries to provide adequate legal protection and effective remedies against the circumvention of technological measures, such as conditional access systems and encryption used by rightholders to protect their rights.¹² The second type of technological safeguards enhance the reliability and integrity of the online marketplace by requiring countries to prohibit the deliberate alteration or deletion of electronic information which accompanies any protected material, and which identifies the work, right owners, and the terms and conditions for its use, among other things.¹³

11. These two types of technological accessories to the rights, and the operation of the new set of rights acknowledged by the Treaties, have added complexity to the traditional balancing of the interests of rightholders and users. Copyright and related rights must yield appropriately in the public interest, including archives and library services, but striking the right balance with the legitimate interests of right owners is not a straightforward process when it comes to digital uses of works. One contemporary example is the use of the so-called “digital rights management” technologies or DRMs, offering technical processes to secure content in a digital form and supporting the exchange of rights and content on digital networks.

⁹ Articles 2(4), 2(8), 2bis(1), 2bis(2), 9(2), 10(1), 10(2), 10bis(1), 10bis(2), and 11bis(2) of the Berne Convention.—See also “minor reservations” in Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 (minutes of Main Committee I), page 924.

¹⁰ Article 15 of the Rome Convention.

¹¹ Articles 10 of the WCT and 16 of the WPPT, and its Agreed Statements.

¹² Article 11 of the WCT and Article 18 of the WPPT.

¹³ Article 12 of the WCT and Article 19 of the WPPT.

12. Libraries and archives have raised concerns that DRMs might thwart certain legitimate uses of works. In their view, DRMs may hinder the simple access to content in electronic form and, therefore, the possibility to read that content or to exercise the right of quotation or use for research or teaching purposes. Also, they can lock up works that are in the public domain and, in general, weaken the exercise of limitations and exceptions to copyright and related rights, namely fair use, fair dealing or statutory limitations to copyright such as exceptions for reasons of preservation and archiving.

13. A uniformly workable solution to these concerns does not seem easy to find since, first, DRM technologies so far are neutral in that they do not discriminate between a circumvention of a technological measure of protection in the pursuit of legitimate uses and a circumvention in outright breach of copyright law. Second, permitting circumvention of such digital controls for legitimate use may prove ineffective, since this task by and large relies on the use of expensive equipment and technologically highly-skilled labor, usually not affordable by the above communities. Besides, trafficking in tools that defeat access or copy control devices is explicitly prohibited by most national copyright laws implementing the WIPO Internet Treaties. In this regard, rightholders understandably point out that any exception to the prohibitions on circumvention carries the risk of enabling uncontrolled access and dissemination of works.

14. In an attempt to find means to accommodate public purpose exceptions, rather than permitting circumvention by creating exceptions to the prohibitions on circumvention, certain laws have incorporated a mechanism to ensure that beneficiaries normally deprived of the enjoyment of the legitimate exceptions by the use of technological measures, can benefit from these exceptions.^{14,15,16,17}

15. Another concern voiced by libraries and archives is that the advent of DRM systems often restricts their possibilities of negotiating licensing agreements with content providers. When purchasing license products through “click-on” or “shrink wrap” licenses, as opposed to the traditional contracts or licensing agreements to obtain copyrighted materials, libraries and educational institutions usually find that the terms of the agreement restrict uses that are otherwise allowed under copyright exceptions, for instance, making copies for library patrons or students, copying on fair-use grounds or copying for preservation purposes.

16. A related question that remains controversial is whether exceptions may be overridden by contractual means, a matter that has become particularly acute in light of the impact of the application of DRM technologies, and the sometimes uneven

¹⁴ Article 75(d) of the Consolidated Act on Copyright of Denmark No. 164 of March 12, 2003.

¹⁵ Section 95(b) of the Law on the Regulation of Copyright in the Information Society of Germany of September 12, 2003.

¹⁶ Section 296ZE of the Copyright and Related Rights Regulations 2003 of the United Kingdom.

¹⁷ Section 1201 of the Digital Millennium Copyright Act (DMCA) of 1998 of the United States of America.

bargaining powers of content providers and licensees. The answer seems to vary from one legislation to another, depending to a large extent on the freedom of contract permitted by the applicable domestic law.

17. As pointed out above, museums, library and archives during the past few years have experienced important changes in their traditional ways of operating. This is due not only to the development of technologies and copyright law, but also to other factors such as globalization of the marketplace and consolidation of the copyright content industries. Important developments have occurred in the fields of content delivery services, interlibrary and direct lending and, certainly, digitization.

18. Compared to document delivery services of libraries in the printed environment, digital delivery services entail potentially greater consequences for copyright protection, particularly with regard to authorized reproduction and applicable exceptions. The traditional limitations and exceptions to copyright, such as private use, use for information and teaching purposes, or fair use, which have served as the grounds for the legitimate provision of paper copies in the analog environment, might not be found to be in full compliance with the three-step test when it comes to providing electronic copies to patrons or students. Digital delivery present a serious potential of uncontrolled wide-scale reproduction and dissemination that may affect the market for, or value of, the copyrighted work, as well as otherwise harm the legitimate interests of rightholders.

19. Similar considerations apply to digital loans to remote-locations users, interlibrary loans and digitization processes. The lending right and principle of exhaustion of the right of distribution are not directly transferable to non-physical products and its electronic dissemination, as it is generally recognized that distribution refers exclusively to fixed copies that can be put into circulation as tangible objects.¹⁸ Moreover, the provision of electronic versions of works to remote users through library lending services involves the operation of certain rights exclusively reserved to the creator, namely the right of reproduction and the right of making available.

20. Digitization, or the process of converting printed material into electronic form, is one of the most important challenges for libraries and archives today. Some strive to digitize material in their collections, not only for the purpose of preservation or storage, but also to facilitate resource sharing with other institutions. Undoubtedly, as a type of reproduction, digitization requires authorization from the right owner of the work that is being converted into digital format. If the digitized material is uploaded in interactive networks, the right to make available must also be obtained from the right owner.

21. An example often cited by these institutions is that copyright imposes inappropriate burdens when they seek to digitize protected works and, despite their

¹⁸ Articles 6 of the WCT and 12 of the WPPT, and their Agreed Statements.

best efforts, they are unable to identify or locate the rightowners (orphan works.) Moreover, identification of the work or other subject matter can be complex, as digital technology allows content to be recast into a variety of forms, such as the multimedia productions which combine completely different types of subject matter into a single embodiment.

22. The uncertainty created by copyright in orphan works may have the potential to undermine the economic incentives to create, by imposing additional costs on subsequent creators wishing to use material taken from existing works. Furthermore, the public interest may also be harmed when works cannot be made available to the public due to uncertainty over their copyright ownership and status, even where no natural person or legal entity is asserting ownership, or where the owner has no objection to such use.

23. In addressing the issue of orphan works, several alternatives have been proposed which confer an important role on DRM and registration. For some, DRM systems would be able not only to identify right owners and monitor use of content, but also facilitate authorizations and remuneration. Besides, it is believed that particular copyright registration systems might have a role to play in facing the challenges posed by orphan works. Specific legislation has been enacted in at least one country while others are in the process of assessing whether specific measures are needed.¹⁹ As regards any proposed solution it is important to note that Article 5(2) of the Berne Convention clearly states that the enjoyment and the exercise of copyright must not be subject to any formality. Registration and deposit of the original or a copy of the work is a typical example of formality.

24. The legal status of the above-cited uses of works, as many other forms of use in the digital environment, is subject to national legislation. As copyright exemptions for museums, archives and library institutions vary from country to country, such new uses may take the form of free use, or may be subject of licensing schemes, whether compulsory or voluntary. As to free uses, many are of the view that if digital versions of works are often as good as or better than the original work, can be replicated an infinite number of times without loss of quality, and can be distributed electronically worldwide with no limits, unauthorized digital uses can destroy the value of copyrighted works. It is therefore considered unfair to equate new digital uses with free uses if strict conditions are not also set so as to limit such likely adverse effects.

25. Unlike is the case with free use, the key to digital licensing schemes is to ensure adequate compensation for rightholders for the use of their material, either statutorily or voluntarily. So far, few countries have adopted compulsory licensing for digital use, that is to say, permission of use against remuneration with no requirement of right

¹⁹ For an overview of different proposals related to registration and orphan works see the Survey of National Legislation on Voluntary Registration Systems for Copyright and Related Rights, WIPO document (SCCR/13/2), available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=52829

owner consent. Such a system may take the form of an extended licensing system, providing for licenses issued by a copyright organization to also cover the rights of non-represented right holders.

26. Voluntary licensing of digital uses is the most common system in place today. Licensing is thereby based on individual permission agreements and governed by the freedom of contract principle, without statutory involvement or statutory management of licensing.

27. Another subject of increased awareness among these institutions is the issue of Internet service provider liability, insofar as providers participate in the on-line provision to users of information and knowledge owned by right holders. The question is if and to what extent such institutions may incur contributory liability for infringements occurring on their networks.

28. The Internet Treaties contain no provision expressly addressing the responsibilities of Internet service providers in this respect. They merely clarify that the provision of physical facilities for enabling or making a communication does not in itself amount to communication,²⁰ a clarification which may limit the direct liability of museums, archives and library institutions for copyright infringement by their patrons or users, using their networks for such acts as hyperlinking and unauthorized uploading or downloading. Whether and how to develop specific rules about contributory liability of Internet service providers is left to national legislation, which however often leaves this question unregulated, or regulated only in broad terms.

WIPO's work

29. In 2002, at the request of the Standing Committee on Copyright and Related Rights, the WIPO Secretariat prepared a list of all the new issues proposed for future review and action by the Committee. Among the most salient issues raised were: the licensing and the ownership of rights, the authorizing and making of multimedia products, issues concerning the implementation of the WCT and the WPPT, including questions relating to technological measures, rights management information and DRMs, fair use and exceptions and limitations, and recordation systems. In this regard, the Committee decided to address those issues in a general way in future sessions, and eventually decide on, the priorities and the methodology of the work.

30. Being two of the main issues of the WCT and the WPPT, technological measures of protection and the limitations and exceptions of copyright and related rights in the digital environment have been a matter of thorough discussions in many different WIPO meetings. In 2003, the Secretariat published a Survey on Implementation

²⁰ Agreed Statement to Article 8 of the WCT.

Provisions of the WCT and the WPPT²¹ and a Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment.²²

31. In the framework of the Standing Committee held in November 2003, WIPO organized an Information Meeting on Digital Content for the Visually Impaired²³ in order to provide an overview of the present situation regarding the provision of works in digital form to visually impaired people, taking into account the main interests at stake. A similar meeting on Educational Content and Copyright in the Digital Age was organized in 2005. Both meetings contributed to a better understanding of the technical, economical and legal aspects of these important issues, thereby promoting later substantive discussions in the SCCR.

32. WIPO has also fostered debate on a range of issues related to other aspects of limitations and exceptions of copyright and related rights, as well as technological measures of protection, particularly regarding the interests of certain beneficiaries such as libraries, educational institutions and users in general.²⁴

33. Another important study commissioned by WIPO is the Study on Current Developments in the Field of Digital Rights Management (DRM),²⁵ which covers the technologies upon which DRM is based, the legal framework in which it operates and the business processes that are being deployed in different countries. Moreover it identifies a number of outstanding legal and policy issues. A further step in the analysis of DRM, now being considered by WIPO, is to examine possible ways to address the interplay between limitations and exceptions and DRM-protected content.

34. In an effort to provide some guidelines and information on the licensing aspects of copyrighted works, including multimedia productions, WIPO published a Licensing Guide on Copyright and Related Rights prepared by various international experts. It provides a practical overview of licensing of rights in a global marketplace, for works such as literary, musical, graphic and pictorial works, motion pictures, multimedia entertainment and education products and computer software.²⁶ In this regard, WIPO has also developed an effective partnership with the private sector, including cooperative agreements with International Confederation of Societies of Authors and Composers (CISAC) and the International Federation of Reproduction Rights Organisations (IFFRO). Collective licensing through these organizations has proved useful in solving some of the problems faced by libraries and other institutions in relation to digitization and accessibility of works.

²¹ See http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_6.pdf

²² See http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf

²³ See http://www.wipo.int/meetings/en/details.jsp?meeting_id=5035

²⁴ See http://www.wipo.int/aspac/en/meetings/2003/pdf/wipo_cr_sel_03_inf1.pdf

See http://www.wipo.int/aspac/en/meetings/2004/pdf/wipo_cr_hkg_04_inf1.pdf

²⁵ See http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_10_2.pdf

²⁶ See http://www.wipo.int/ebookshop?lang=eng&cmd=display_pub&cat_id=1205&cart_id=509865-10935011

35. A very recent development has been the inclusion of the issue of exceptions and limitations to copyright and related rights for the purposes of education, libraries and disabled persons, in the current agenda of the Standing Committee, with a view to strengthen international understanding of the need to have adequate limitations, exploring existing and proposed models of protection, and moving towards agreement regarding these specific exceptions.

36. Also, a Survey of National Legislation on Voluntary Registration Systems for Copyright and Related Rights has been prepared by the WIPO Secretariat in cooperation with its Member States. The Survey is of an informative and descriptive nature. It aims at helping to evaluate different systems of copyright registration and the prospects for evolution in the new digital environment, where an increasing need exists to easily identify creative content and monitor its use.

37. Finally, WIPO has taken a participatory and inclusive approach to involve key stakeholders in dialogue to achieve consensus and solve legitimate concerns. It is WIPO's policy to engage Member States and different non-governmental organizations in a regular dialogue and to facilitate debate among them, in open fora. The work achieved with the International Publishers Association and the International Federation of Library Associations and Institutions illustrates this point.

Protection of traditional cultural expressions against misappropriation and misuse

38. The relationship between IP and the promotion, preservation and protection of traditional cultural expressions/expressions of folklore (TCEs), and the related area of traditional knowledge (TK), is the subject of policy development, norm-building and capacity-building programs at WIPO.

39. In the course of this work within WIPO, indigenous peoples and other traditional communities have expressed the concern that activities by museums and other cultural institutions and initiatives aimed at safeguarding and promoting cultural heritage do not always take adequate account of their rights and interests, and that collecting, digitizing and making accessible, for instance, a traditional song, performance or a tribal symbol, make them vulnerable to misappropriation. Representatives of indigenous peoples and other cultural and traditional communities participate actively in WIPO's work and have contributed valuably to it.^{27,28}

²⁷ WIPO's work on TCEs and TK relates to the concerns and interests of indigenous peoples and other local, traditional and cultural communities, although these terms have not been precisely defined. Within Europe, they would include indigenous peoples such as the Inuit and Saami, and, potentially at least, other traditional and cultural communities in Europe. Presumably, the Commission's digitization project might also include elements of the cultural heritage of peoples and communities from other parts of the world held in the collections of European institutions.

²⁸ This Note is not intended to preempt or represent the views of indigenous peoples and other communities but rather to provide information on WIPO's work on these issues, including on our experiences in consulting extensively with indigenous peoples and other communities over several years.

40. In general, it is argued by indigenous peoples that they do not have control over research conducted into their cultures, nor over how their cultures are recorded and presented to the public at large. The handling of secret and sacred materials within ethnographic collections can be a source of particular concern.

41. In other words, the very process of *preservation* of traditional cultural expressions can trigger concerns about their lack of legal *protection* against misappropriation and misuse.

42. In relation to the references to public domain materials in the Communication and related documents, it is the “public domain” character of many TCEs under conventional IP laws, the subject of criticism especially by indigenous peoples, which can make them particularly vulnerable to forms of appropriation and use by others that are criticized by such peoples.²⁹ For instance, while a traditional song may be treated by IP law as in the “public domain” (a notion rejected by many indigenous representatives), recording that song creates IP rights in the recording, which are held by the person making the recording. The making of such recordings without the prior and informed consent of the relevant indigenous community, the absence of an acknowledgement of source and the failure to share benefits derived from such a new recording are criticized by representatives of indigenous peoples and other communities taking part in WIPO's discussions. In addition, materials viewed as “public domain” in some jurisdictions might be covered by copyright and related rights or other laws of countries which have chosen to provide specific protection in those laws for expressions of folklore.³⁰

43. On the other hand, the establishment of IP rights in new recordings of traditional cultural expressions, including new rights in digitized versions, could be used positively to promote the interests of source communities. For example, the rights could be vested in or shared with the source communities; equally, the rights could be exercised in ways that take into account the cultural and economic interests of the source communities.

44. In this way, IP tools can be used, if so wished as a specific policy choice, to protect the underlying traditional cultural expressions against misappropriation and misuse for the cultural, social and economic benefit of relevant source communities.

45. Therefore, as indigenous peoples and other communities have pointed out, how IP rights in new recordings and digitizations of “public domain” materials are exercised can impact significantly on their IP-related interests. Similarly, how cultural

²⁹ See “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore”, WIPO, 2004, pages 13 to 15, available electronically at http://www.wipo.int/tk/en/publications/785e_tce_background.pdf

³⁰ *Idem.* It might also be added that the WIPO Performances and Phonograms Treaty, 1996 (WPPT), provides protection for performers of expressions of folklore.

heritage is collected, studied, catalogued, inventoried and made accessible can also affect the IP interests of indigenous and other traditional and cultural communities.

Development of IP-related options, guidelines and "best practices"

46. In response to a widely-felt need for technical advice and a sharing of experiences on these issues, WIPO is undertaking a project, with the close involvement of cultural institutions and specialists, communities and other stakeholders, aimed at developing IP-related options, practical guidelines and "best practices" for cultural institutions and specialists engaged in collecting, inventorying, digitizing, preserving and making accessible cultural heritage materials.³¹

47. As a first step in the project, experts have recently been commissioned by WIPO to undertake fieldwork and research aimed at ascertaining the practical IP-related experiences and needs of museums, archives and other such institutions, with particular reference to issues of access to, ownership of and control over collections of TCEs. This initial work will lay an empirical foundation for the subsequent distillation and development of the options, guidelines and "best practices." We would be pleased to share the results of this project with you, and, similarly, experiences with your initiative could contribute valuably to our project.

48. This project is a practical complement to the ongoing policy discussion of *sui generis* and other approaches to the legal protection of TCEs and traditional knowledge taking place within WIPO.

Policy discussions

49. Ongoing policy discussions within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Intergovernmental Committee)³² are considering various objectives and principles for the protection of TCEs and traditional knowledge.

50. A draft set of principles and objectives being discussed within the Committee³³ recognize, amongst other things, collective interests in expressions of traditional cultures which are "characteristic" of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the cultural expressions. The draft principles and objectives suggest certain exceptions from protection for the making of recordings and other reproductions of TCEs "for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes," although this exception might, the draft suggests, be

³¹ See <http://www.wipo.int/tk/en/folklore/culturalheritage/index.html>

³² See <http://www.wipo.int/tk/en/index.html>

³³ Available as WIPO document WIPO/GRTKF/IC/8/4 (TCEs). Comments received on earlier drafts are available at http://www.wipo.int/tk/en/consultations/draft_provisions/comments.html (December 5, 2005).

limited by certain public policy considerations.³⁴ The draft WIPO principles and objectives are intended to “complement and work together with laws and measures for the preservation and safeguarding of cultural heritage.”

51. WIPO Member States have called for accelerated progress in these areas, stressed the “international dimension” of these questions and emphasized that no outcome of WIPO’s work is excluded, including the possible development of an international instrument or instruments. They have also underscored that WIPO’s work should not prejudice developments in other forums. As participants in the Intergovernmental Committee’s sessions acknowledge, the issues under discussion are complex and require careful consideration.

52. As can be seen, the kinds of objectives and principles under consideration address directly some of the issues raised by the Digital Libraries Initiative in so far as “traditional” cultural materials are concerned, and include, for example, specific exceptions that could be aimed at facilitating exactly this kind of initiative. Further consideration of these draft objectives and principles could benefit from experiences with your initiative; we would also be pleased to remain in contact and share our experiences with these complex and sensitive questions.

Conclusion

53. Copyright law is constantly evolving and new agreements are shaped as new technologies develop. Issues regarding the protection of rightholders, on the one hand, and the need to serve the public interest in education, research and access to information and knowledge, on the other hand, give rise to the broad challenge of how to achieve balance in the global information infrastructure so as to ensure that rightholders are rewarded and compensated for their creative efforts, and the recognition that certain communities and groups of the public must benefit from reasonable exceptions; a balance which all stakeholders recognize as being indispensable for human progress. WIPO’s work on developing IP standards, options, guidelines and “best practices,” as well as ongoing discussions in the WIPO Standing Committee on Copyright and Related Rights, might contribute to the European Commission’s further work, and we would be pleased to share the results of this work with you. Similarly, experiences with the Commission’s Digital Libraries project would contribute usefully to our work.

54. Regarding traditional cultural expressions, the perspectives, experiences and concerns of indigenous peoples and other traditional and cultural communities have enriched WIPO’s work on these issues, and add, it is suggested, a valuable dimension to consideration of these issues. WIPO’s work on developing IP-related options, guidelines and “best practices” regarding the safeguarding of cultural heritage and the promotion of creativity, as well as ongoing policy discussions in the WIPO

³⁴ See Draft Article 5.

Intergovernmental Committee, might contribute to the European Commission's further work. We would be pleased also to share the results of this work with you. Similarly, experiences with the Commission's Digital Libraries project would contribute usefully to this work.

[End of Note]